

A DIGEST
OF
ENGLISH CIVIL LAW

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BOOK II, PART I LAW OF CONTRACT (GENERAL)

BY

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SCHEME OF THE WORK

BOOK I.—GENERAL *Edward Jenks*

BOOK II.—OBLIGATIONS

Part I. Obligations arising from Contract (General) *R. W. Lee*

Part II. Obligations arising from particular Contracts *R. W. Lee*

Part III. Obligations arising from Quasi-Contract and Tort *J. C. Miles*

BOOK III.—THINGS (PROPERTY LAW) *Edward Jenks*

BOOK IV.—FAMILY LAW *W. M. Geldart*

BOOK V.—SUCCESSION *W. S. Holdsworth*

P R E F A C E

THIS instalment of the work is an attempt to state the general Law of England on the important subject of Contracts, as it stood at the close of the year 1905. That law is very modern ; not much of it is older than the middle of the eighteenth century. Even when Blackstone wrote, its existence, though beginning to make itself felt, was not deemed sufficiently important to merit more than a brief notice in a work professing to deal with the whole of English Law.

The explanation of this remarkable fact will be found in the treatment of Particular Contracts, which will form the subject of Part II of the present Book, intended to be published in the autumn of this year. Part II will deal with Sale (of Goods and Land), Hiring, Loan, Deposit, Employment (including Master and Servant, Master and Apprentice, Principal and Agent, and Independent Contractor), Inn-keeper and Guest, Carriers, Partnership, Principal and Surety, Insurance, and Gaming Contracts. These subjects seem to us to fall naturally under the head of Contract. To our forefathers, they presented themselves rather as social relationships regulated by law ; and it was not until the great judges of the later eighteenth and early nineteenth centuries (headed by Lord Mansfield) began to generalize from the somewhat arbitrary rules affecting these relationships, that our present Law of Contract made its appearance. At the present day, these relationships, oddly

enough, are treated as exceptions from (or, at least, as peculiarities of) the general Law; and as such are here made to succeed it. Historically speaking, they are the materials out of which the general Law of Contract has been built. A striking but premature example of the process is to be found in Lord Holt's famous judgment in *Coggs v. Bernard*.

These reflections, however, interesting as they must be to any one who cares for the history of our Law, should not be allowed to obscure the practical value of this Part, as a simple and, it is believed, trustworthy statement of the general principles of our Law of Contract. Much of it is, no doubt, very elementary; but it is surprising to find how often elementary rules are forgotten. And as the Editor's share in the present instalment is a humble one, he may venture to point out that there are some parts of the Law of Contract which appear to be by no means very familiar, even to learned practitioners; and that there are few of us who would not derive benefit from a reference to Mr. Lee's careful statement of the rights of the parties arising from a breach of contract (Section V) or of the different consequences arising from the adoption of one of the various forms of co-contracting (Section VII).

The Index and Tables will add, it is hoped, to the utility of the work as a book of reference for the practitioner; and in this connection I am much indebted to my former pupil, Mr. Nevile S. Done, for the great care which he has expended on the Index, and to Mr. Coryton Day for his work on the Tables.

EDWARD JENKS.

20th January, 1906.

CONTENTS OF BOOK II, PART I

	PAGE
SECTION I—FORMATION OF CONTRACT	
TITLE I—OFFER AND ACCEPTANCE	85
TITLE II—FORM AND CONSIDERATION	92
SECTION II—PARTIES TO A CONTRACT	103
SECTION III—PERFORMANCE OF CONTRACT	
TITLE I—DUTY OF PERFORMANCE	105
TITLE II—CONSEQUENCES OF NON-PERFORMANCE	120
TITLE III—IMPOSSIBILITY OF PERFORMANCE	129
TITLE IV—RECIPROCAL PROMISES	134
TITLE V—EARNEST AND PENALTIES	136
SECTION IV—ASSIGNMENT OF CONTRACT	141
SECTION V—DISCHARGE OF CONTRACT	144
SECTION VI—DISCHARGE OF RIGHTS OF ACTION ARISING FROM CONTRACT	150
SECTION VII—CO-DEBTORS AND CO-CREDITORS	153

CONTENTS OF BOOK I

	PAGE
SECTION I—PERSONS	
TITLE I—NATURAL PERSONS	1
TITLE II—ARTIFICIAL PERSONS	5
SECTION II—THINGS	15
SECTION III—LEGAL ACTS	
TITLE I—LEGAL CAPACITY	20
TITLE II—DECLARATION OF INTENTION	32
TITLE III—CONDITIONS	47
TITLE IV—AGENCY AND REPRESENTATION	52
SECTION IV—TIME	67
SECTION V—LIMITATION OF ACTIONS	72
SECTION VI—SELF HELP	82

TABLE OF STATUTES

29 Car. 2, c. 3 (Statute of Frauds, 1677)	86, 98
s. 4	
4 & 5 Anne, c. 16 (Common Law Amendment Act, 1705)	118
s. 13	
3 & 4 Will. 4, c. 42 (Civil Procedure Act, 1833)	117
s. 28	
c. 98 (Bank of England Act, 1833)	108
s. 6	
1 & 2 Vict. c. 110 (Judgments Act, 1838)	117
s. 17	116
17 & 18 Vict. c. 90 (Usury Laws Repeal Act, 1854)	
19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856)	101
s. 3	
33 Vict. c. 10 (Coinage Act, 1870)	108
s. 4	108
s. 11	
33 & 34 Vict. c. 35 (Apportionment Act, 1870)	116
s. 2	
45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882)	118
s. 9 (3)	118
s. 57 (1)	118
s. 57 (1) (b)	118
s. 57 (3)	145
ss. 59, 62, 63	149
s. 64	118
s. 89	
46 & 47 Vict. c. 52 (Bankruptcy Act, 1883)	149
s. 30 (1)	149
s. 30 (2)	149
s. 37 (6)	
54 & 55 Vict. c. 39 (Stamp Act, 1891)	100
s. 93	109
s. 103	
56 & 57 Vict. c. 71 (Sale of Goods Act, 1893)	86
s. 4	99
s. 4 (1)	100
s. 4 (2) (3)	129
s. 6	130
s. 7	

s. 11 (1) (c)	135
s. 29 (1) (2)	112
s. 29 (4)	113
s. 52	125
s. 53	124
57 & 58 Vict. c. 60 (Merchant Shipping Act, 1894)	
s. 506	100
63 & 64 Vict. c. 51 (Money Lenders Act, 1900)	116

TABLE OF CASES

Adams <i>v.</i> Lindsell (1818) 1 B. & Ald	683	90
Adderley <i>v.</i> Dixon (1824) 1 S. & S.	607	125
A. G. <i>v.</i> Jacobs-Smith [1895] 2 Q. B.	349	104
Agius <i>v.</i> G. W. Colliery Co. [1899] 1 Q. B.	312	122
Aldons <i>v.</i> Cornwell (1868) L. R. 3 Q. B.	573	149
Allen <i>v.</i> Cameron (1833) 1 Cr. & M.	840	124
Anderson <i>v.</i> Martindale (1801) 1 East,	497	157
Anglo-Egyptian Co. <i>v.</i> Rennie (1875) L. R. 10 C. P.	271	132, 146
Appleby <i>v.</i> Myers (1867) L. R. 2 C. P.	651	130, 132
Arthur <i>v.</i> Wynne (1880) 14 Ch. D.	603	130
Ash <i>v.</i> Pouppeville (1867) L. R. 3 Q. B.	86	151
Asiatic Banking Co. <i>ex parte</i> (1867) L. R. 2 Ch. App.	391	91, 103
Astley <i>v.</i> Weldon (1801) 2 B. & P.	346	138
Avery <i>v.</i> Bowden (1855) 5 E. & B.	714	147
Bailey <i>v.</i> Sweeting (1861) 9 C. B. N. S.	843	101, 102
Baily's Case (1868) L. R. 5 Eq.	428	88
Baily <i>v.</i> de Crespigny (1869) L. R. 4 Q. B.	180	120
Bain <i>v.</i> Cooper (1842) 9 M. & W.	701	158
Bain <i>v.</i> Fothergill (1874) L. R. 7 H. L.	158	121
Baird <i>v.</i> Wells (1890) 44 Ch. D.	661	127
Bank of Brazil, <i>ex parte</i> [1893] 2 Ch.	438	123
Bank of New South Wales <i>v.</i> O'Connor (1889) L. R. 14 App. Ca.	284	108
Bankart <i>v.</i> Bowers (1866) L. R. 1 C. P.	484	106
Banner <i>v.</i> Lowe (1806) 13 Ves.	135	116
Barclay, <i>re</i> [1899] 1 Ch.	674	119
Barclay <i>v.</i> Messenger (1874) 43 L. J. Ch.	449	113
Birker <i>v.</i> Hodgson (1814) 3 M. & S.	267	129
Barker <i>v.</i> St. Quintin (1844) 12 M. & W.	453	150
Barkworth <i>v.</i> Young (1856) 4 Drew	25	131
Barrell, <i>ex parte</i> (1875) L. R. 10 Ch. App.	514	136
Bartlett <i>v.</i> Holmes (1853) 13 C. B.	638	124
Batard <i>v.</i> Howes (1853) 2 E. & B.	287	156
Bayley <i>v.</i> Homan (1837) 3 Bing N. C.	920	151
Beaumont <i>v.</i> Greathead (1846) 2 C. B.	500	154
Behn <i>v.</i> Burness (1863) 3 B. & S.	751	135
Bell <i>v.</i> Banks (1841) 3 M. & G.	258	149
De Bernales <i>v.</i> Fuller (1810) 2 Campb.	426	116
Betterbee <i>v.</i> Davis (1811) 3 Campb.	70	108
Bettini <i>v.</i> Gye (1876) 1 Q. B. D.	183	148
Bidder <i>v.</i> Bridges (1887) 37 Ch. D. (C. A.)	406	151
Bill <i>v.</i> Bament (1841) 9 M. & W.	36	102

Bird <i>v.</i> Liverpool (1829) 9 B. & C. 392	98
Bird <i>v.</i> Randall (1762) 1 Wm. Bl. 388	155
Bird <i>v.</i> Smith (1848) 12 Q. B. 786	105
Birks <i>v.</i> Trippett (1666) 1 Wms. Saund. 33	115
Birkmyr <i>v.</i> Darnell (1705) 1 Salk. 27	98
Black <i>v.</i> Smith (1791) Peake, 88	109
Le Blanch <i>v.</i> L. & N. W. Ry. Co. (1876) 1 C. P. D. 31	123
Blaney <i>v.</i> Hendricks (1771) 2 W. Bl. 761	118
Boast <i>v.</i> Firth (1868) L. R. 4 C. P. 1	130
Bolton <i>v.</i> Madden (1873) L. R. 9 Q. B. 55	94
Boydell <i>v.</i> Drummond (1809) 11 East, 142	102
Bradburne <i>v.</i> Botfield (1845) 14 M. & W. 573	156
Bristol Bread Co. <i>v.</i> Maggs (1890) 44 Ch. D. 616	89
Britain <i>v.</i> Rossiter (1882) 11 Q. B. D. 123	99, 100
British Waggon Co. <i>v.</i> Lea (1879) 5 Q. B. D. 149	110
Brogden <i>v.</i> Metro. Ry. Co. (1877) L. R. 2 App. Ca. 666	90, 91
Brown <i>v.</i> Royal Ins. Co. (1859) 1 E. & E. 853	110, 130, 132
Bruce <i>v.</i> Hunter (1813) 3 Campb. 467	116
Burns <i>v.</i> Bryan (1887) L. R. 12 App. Ca. 184	154
Butler's & Baker's Case (1591) 3 Rep. 25	97
Buxton <i>v.</i> Lister (1746) 3 Atk. 383	125, 127
Buxton <i>v.</i> Rust (1872) L. R. 7 Ex. 1, & 279	101
Byrne <i>v.</i> Van Tienhoven (1880) 5 C. P. D. 344	89
Cabell <i>v.</i> Vaughan (1669) 1 Wms. Saund. 461	157
Callisher <i>v.</i> Bischoffshiem (1879) L. R. 5 Q. B. 449	94
Calton <i>v.</i> Bragg (1812) 15 East, 223	116, 118
Cameron <i>v.</i> Wells, re (1887) 37 Ch. D. 32	104
Carlill <i>v.</i> Carbolic Smoke Ball Co. [1893] 1 Q. B. (C. A.) 256	91, 93
Carlton Co. <i>v.</i> Castle Mail Co. [1898] A. C. 486	112
Caton <i>v.</i> Caton (1865) L. R. 1 Ch. App. 137	99
Caton <i>v.</i> Caton (1867) L. R. 2 H. L. 127	101, 125
Catt <i>v.</i> Tourle (1869) L. R. 4 Ch. App. 654	128
Chandler <i>v.</i> Webster [1904] 1 K. B. (C. A.) 493	132, 146
Chapman <i>v.</i> Franklin (1905) XXI T. L. R. 515	94
Chinnoek <i>v.</i> The Marchioness of Ely (1865) 4 D. J. & S. 638	91
Christie <i>v.</i> Borelly (1860) 7 C. B. N. S. 561	134
Christie <i>v.</i> Taunton [1893] 2 Ch. 175	143
City Discount <i>v.</i> McLean (1874) L. R. 9 C. P. 692	114
Clarke <i>v.</i> Hart (1858) 6 H. L. C. 635	126
Clayton's Case (1816) 1 Mer. 572	113, 114
Clifford <i>v.</i> Watts (1871) L. R. 5 C. P. 588	95, 129
Clyde Bank Engineering Co. <i>v.</i> Castaneda [1905] A. C. 6	138
Coles <i>v.</i> Sims (1854) 5 De G. M. & G. 1	139
Collins <i>v.</i> Blanter (1766) 2 Wils. 341	95, 139
Commings <i>v.</i> Scott (1875) L. R. 20 Eq. 15	101
Commrs. of Stamps <i>v.</i> Hope [1891] A. C. 476	152
Cook <i>v.</i> Oxley (1790) 3 T. R. 650	92
Cook <i>v.</i> Wright (1861) 1 B. & S. 559	94
Cork <i>v.</i> Baker (1716) 1 Stra. 34	98
Cornwall <i>v.</i> Henson [1900] 2 Ch. (C. A.) 298	126
Cowan <i>v.</i> O'Connor (1888) 20 Q. B. D. 640	91
Cranley <i>v.</i> Hillary (1813) 2 M. & S. 122	105

XV

Cray v. Smith (1839) 43 Ch. D. 208	99
Crouch v. Credit Foncier (1873) L. R. 8 Q. B. 380	142
Crowhurst v. Laverack (1852) 8 Exch. 208	95
Cullen v. Knowles [1898] 2 Q. B. 380	157
Cumber v. Wane (1718) 1 Stra. 426	151
Cunningham v. Dunn (1878) 3 C. P. D. 443	129
Currie v. Misa (1875) L. R. 10 Ex. 162	93
Cutter v. Powell (1795) 6 T. R. 320	132
Da Costa v. Davis (1798) 1 B. & P. 242	131
Dale v. Hamilton (1846) 5 Hare, 381	99
Davidson v. Cooper (1844) 13 M. & W. 343	149
Davies v. Penton (1827) 6 B. & C. 216	137
Day v. McLea (1889) 22 Q. B. D. (C. A.) 610	151
Dickinson v. Dodds (1876) 2 Ch. D. 463	88, 89
Dixon v. Clarke (1848) 5 C. B. 377	107
Donellan v. Read (1832) 3 B. & Ad. 899	98
Douglas v. Patrick (1790) 3 T. R. 683	107, 108
Duff's Exors' Case (1886) 32 Ch. D. 301	88
Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D. 25	124
E. W. A. In re [1901] 2 K. B. 642	155
Eaton v. Bell (1821) 5 B. & Ald. 34	116
Eccleston v. Clipsham (1668) 1 Wms. Saund. 153	156
Eley v. Positive Life Assur. Co. (1876) 1 Ex. D. 88	103
Ellesmere Brewery Co. v. Cooper [1896] 1 Q. B. 75	156
Elliott v. Crutchley [1904] 1 K. B. 565	132
H. L. (E.) 1905, W. N. 164 }	
Esdaile v. Stephenson (1822) 1 Sim. & S. 122	119
Evans v. Powis (1847) 1 Exch. 601	151
Exall v. Partridge (1799) 8 T. R. 308	103
Farrow v. Wilson (1869) L. R. 4 C. P. 744	130
Faulkner v. Lowe (1848) 2 Exch. 595	95, 103
Favene v. Bennett (1809) 11 East, 36	114
Ferguson v. Fyffe (1841) 8 Cl. & F. 121	116
Fessard v. Mugnier (1865) 18 C. B. N. S. 286	111
Field v. Carr (1828) 5 Bing. 15	114
Finch v. Brook (1834) 1 Scott, 76	107
Finlay v. Chirney (1888) 20 Q. B. D. 494	111
Fitch v. Sutton (1804) 5 East, 230	95
Fletcher v. Fletcher (1845) 14 L. J. Ch. 66	97
Flight v. Bolland (1828) 4 Russ. 298	128
Florence v. Jenings (1857) 2 C. B. N. S. 454	118
Flureau v. Thornhill (1776) 2 W. Bl. 1078	121
Foakes v. Beer (1884) L. R. 9 App. Ca. 605	151, 152
Foord v. Noll (1842) 2 Dowl. N. S. 614	106
Forster v. Hale (1798) 3 Ves. 712	99
Foster v. Dawber (1851) 6 Exch. 839	144, 145
Foster v. Mentor Life Assurance Co. (1854) 3 E. & B. 48	101
Fothergill v. Phillips (1871) L. R. 6 Ch. App. 770	126
Fraser v. Hatton (1857) 2 C. B. N. S. 512	95
Freeth v. Burr (1874) L. R. 9 C. P. 208	146, 147, 148

French v. Macale (1842) 2 Dr. & W.	284	139
Freshfield v. Reed (1842) 9 M. & W.	404	96
Frost v. Knight (1872) L. R. 7 Ex.	114	120, 122, 124, 147
Gabriel v. Dresser (1855) 15 C. B.	622	151
Gale v. Gale (1877) 6 Ch. D.	144	104
Gee v. Lanes, & York Ry. Co. (1860) 6 H. & N.	220	122
Geipel v. Smith (1872) L. R. 7 Q. B.	404	132
General Accident Assurance v. Noel [1902] 1 K. B.	377	139
Gibbs v. Cruickshank (1873) L. R. 8 C. P.	454	123
Gibbs v. Fremont (1853) 9 Exch.	32	125
Gillett v. Mawman (1808) 1 Taunt.	140	132
Glaholm v. Hays (1841) 2 M. & G.	257	148
Godefroy v. Jay (1831) 7 Bing.	413	121
Goman v. Salisbury (1684) 1 Vern.	240	145
Goss v. Lord Nugent (1833) 5 B. & Ad.	65	145
Govt. of Newfoundland v. Newfoundland Ry. Co. (1888) L. R. 13 App. Ca.	199	143
Graham v. Johnson (1869) L. R. 8 Eq.	36	142
Graves v. Legg (1854) 9 Exch. 716 & 1857 2 H. & N.	210	155
Gray v. Pearson (1870) L. R. 5 C. P.	568	104
Grey v. Ellison (1856) 1 Giff.	438	103
Grey v. Hesketh (1755) Ambl.	268	107
Griffith v. Tower Publishing Co. [1897] 1 Ch.	21	141
Hadley v. Baxendale (1854) 9 Exch.	341	122
Haigh v. Brooks (1839) 10 A. & E.	309	94, 101
Haldane v. Johnson (1853) 8 Exch.	689	105, 111
Hall v. Flockton (1851) 16 Q. B.	1039	151
Hall v. Palmer (1844) 13 L. J. Ch.	352	97
Hamlin v. G. N. Ry. Co. (1856) 1 H. & N.	408	122, 123
Hammond v. Schofield [1891] 1 Q. B.	453	152
Harben v. Phillips (1883) 23 Ch. D. (C. A.)	14	96
Harding, ex parte (1879) 12 Ch. D.	557	154
Harding v. Harding (1886) 17 Q. B. D.	442	142
Harris v. Goodwyn (1841) 2 M. & G.	405	150
Harris v. Petherick (1879) 4 Q. B. D.	611	124
Hart v. Mills (1846) 15 M. & W.	87	88
Harvey v. Gibbons (1675) 2 Lev.	161	95, 129
Harvey v. Grabham (1836) 5 A. & E.	73	145
Hutton v. Russell (1888) 38 Ch. D.	334	148
Head v. Tattersall (1871) L. R. 7 Ex.	7	146
Henderson v. Stobart (1850) 5 Exch.	99	151
Hentborn v. Fraser (1892) 2 Ch.	27	89, 91
Herey v. Birch (1804) 9 Ves.	357	127
Hick v. Raymond [1893] A. C.	22	112
Higgins' Case (1605) 6 Rep.	45 b	149
Higgins v. Samels (1862) 2 J. & H.	460	126
Hill's Case (1875) L. R. 20 Eq.	585	155
Hills v. Sughrue (1846) 15 M. & W.	233	129
Hitchman v. Stewart (1855) 3 Dr.	271	156
Hobbs v. L. & S. W. Ry. Co. (1875) L. R. 10 Q. B.	122	122, 123, 125
Hochster v. Delatour (1853) 2 E. & B.	678	120

TABLE OF CASES

xvii

Hodgkinson, <i>ex parte</i> (1815) 19 Ves.	291	96
Hodgson, <i>re</i> (1885) 31 Ch. D.	177	155
Hogan <i>v.</i> Page (1798) 1 B. & P.	337	118
Hole <i>v.</i> Bradbury (1879) 12 Ch. D.	886	141
Holford <i>v.</i> Acton Urban District Council [1898] 2 Ch.	240	128
Hollis <i>v.</i> Palmer (1836) 2 Bing. N. C.	717	116
Holmes <i>v.</i> Bell (1841) 3 M. & G.	213	149
Hope <i>v.</i> Walter [1900] 1 Ch.	257	127
Hopkins <i>v.</i> Logan (1839) 5 M. & W.	241	94
Hotham <i>v.</i> East India Co. (1787) 1 T. R.	638	134
Household Fire Insurance Co. <i>v.</i> Grant (1879) 4 Ex. D.	216	91
Howard <i>v.</i> Hopkins (1742) 2 Atk.	371	139
Howard <i>v.</i> Woodward (1864) 34 L. J. Ch.	47	139
Howe <i>v.</i> Smith (1884) 27 Ch. D.	92	126, 136, 137
Hudson <i>v.</i> Fawcett (1844) 7 M. & G.	348	116
Humphrey <i>v.</i> Dale (1857) 7 E. & B.	266	105
Hunt <i>v.</i> Bate (1568) 3 Dyer,	272	94
Hyde <i>v.</i> Wrench (1840) 3 Beav.	334	88, 90
Isherwood <i>v.</i> Whitmore (1843) 11 M. & W.	347	106
Jackson, <i>re</i> (1887) 34 Ch. D.	732	157
Jackson <i>v.</i> Union Marine Insurance Co. (1874) L. R. 10 C. P.	148	146
Jacobs <i>v.</i> Credit Lyonnais (1884) 12 Q. B. D.	589	129
Jeffreys <i>v.</i> Jeffreys (1841) Cr. & Ph.	138	96
Jell <i>v.</i> Douglas (1821) B. & Ald.	374	157
Jersey <i>v.</i> G. W. Ry. Co. [1894] 3 Ch.	625	127
Johnson <i>v.</i> Dodgson (1837) 2 M. & W.	659	101
Johnstone <i>v.</i> Milling (1886) 16 Q. B. D. (C. A.)	460	120, 146, 147
Jones <i>v.</i> Arthur (1840) 8 Dowl.	442	108, 109
Jones <i>v.</i> Ashburnham (1804) 4 East,	455	93, 95
Jones <i>v.</i> Berkley (1781) 2 Dougl.	659	106, 134, 135
Jones <i>v.</i> Heavens (1877) 4 Ch. D.	636	139
Jones <i>v.</i> Mudd (1827) 4 Russ.	118	119
Jones <i>v.</i> Victoria Graving Dock Co. (1877) 2 Q. B. D.	314	101
Keene <i>v.</i> Dutton (1844) 7 M. & Gr.	807	94
Keene <i>v.</i> Keene (1857) 3 C. B. N. S.	144	118
Keightley <i>v.</i> Watson (1849) 3 Ex.	721	157
Kelsey <i>v.</i> Dodd (1881) 52 L. J. Ch.	39	103
Kemble <i>v.</i> Farren (1829) 6 Bing.	147	137
Kendall <i>v.</i> Hamilton (1879) L. R. 4 App. Ca.	504	152, 155
Kennedy <i>v.</i> Brown (1863) 13 C. B. N. S.	677	94
King <i>v.</i> Gillett (1840) 7 M. & W.	55	144
King <i>v.</i> Hoare (1844) 13 M. & W.	494	154
Kingston <i>v.</i> Preston (1773) 2 Dougl.	689	134, 135
Kinnaird <i>v.</i> Trollope (1889) 42 Ch. D.	610	107, 108
Krell <i>v.</i> Henry [1903] 2 K. B. (C. A.)	748	130, 132
Laing <i>v.</i> Meader (1824) 1 C. & P.	257	106
Lamare <i>v.</i> Dixon (1873) L. R. 6 H. L.	414	126
Lampleigh <i>v.</i> Braithwait (1614) Hob.	105	94
Lamprell <i>v.</i> Billericay Union (1849) 3 Exch.	283	96

Land Credit Co. v. Fermoy (1870) L. R. 5 Ch. App. 323	155
Langfort v. Tiler's Admix. (1704) 1 Salk. 113	136
Law v. Redditch Local Board [1892] 1 Q. B. 132	137, 138, 139
Layton v. Pearce (1778) 1 Dougl. 15	110
Léple v. Rogers [1893] 1 Q. B. 31	122
Leroux v. Brown (1852) 12 C. B. 801	100
Levy v. Stogden [1898] 1 Ch. 478	136
Levy v. Yates (1838) 8 A. & E. 129	95
Lilley v. Doubleday (1881) 7 Q. B. D. 510	122
Lintott, ex parte (1867) L. R. 4 Eq. 188	117
Liversidge v. Broadbent (1859) 4 H. & N. 603	143
Lloyd v. Dimminack (1877) 7 Ch. D. 398	123
Lloyd v. Nowell [1895] 2 Ch. 744	91
Lloyd Edwards, re (1892) 61 L. J. Ch. 22	117
Lock v. Furze (1866) L. R. 1 C. P. 451	121
Logan v. Wienholt (1833) 1 Cl. & F. 611	140
London & Northern Bank, in re [1900] 1 Ch. 220	91
Long v. Millar (1879) 4 C. P. D. 454	102
Lovelock v. Franklyn (1846) 8 Q. B. 371	120, 146
Lowe v. Dixon (1885) 16 Q. B. D. 455	156
Lowndes v. Collens (1810) 17 Ves. 27	118
Lucan, in re (1890) 45 Ch. D. 470	96, 127
Lucas v. Dixon (1889) 22 Q. B. D. 357	102
Lucas v. James (1849) 7 Hare, 410	90
Luke v. South Kensington Hotel Co. (1879)	157
Lumley v. Wagner (1852) 1 De G. M. & G. 604	128
MacIver v. Richardson (1813) 1 M. & S. 557	90
Maddison v. Alderson (1883) L. R. 8 App. Ca. 479	99, 100
Makin v. Watkinson (1871) L. R. 6 Ex. 25	115
Mangles v. Dixon (1852) 3 H. L. C. 735	142
Minners v. Pearson [1898] 1 Ch. 581	110
Manser v. Back (1848) 6 Ha. 449	126
Marchant v. Morton, Down, & Co. [1901] 2 K. B. 829	142
Miy v. Lane (1894) 64 L. J. Q. B. 236	141
Marquis of Bute v. Thompson (1844) 13 M. & W. 487	129
Murzetti v. Williams (1830) 1 B. & Ad. 415	121, 124
Mayfield v. Wadsley (1824) 3 B. & C. 362	114
Muther v. Lord Maidstone (1856) 18 C. B. 273	94
McLeod v. Power [1898] 2 Ch. 295	152
McMinus v. Bark (1870) L. R. 5 Ex. 65	151
McMinus v. Cooke (1887) 35 Ch. D. 697	99
McMurray v. Spicer (1868) L. R. 5 Eq. 527	101
Mecca, The [1897] A. C. 286	114
Menetone v. Athawes (1764) 3 Burr. 1592	132
Mercantile Bank v. Taylor [1893] A. C. 317	155
Mersey Steel & Iron Co. v. Naylor (1884) L. R. 9 App. Ca. 434	120, 146, 147, 148
Meyer v. Dresser (1864) 16 C. B. N. S. 660	105
Michael v. Hart [1902] 1 K. B. 482	122
Miles v. New Zealand Alford Estate Co. (1886) 32 Ch. D. (C. A.) 266	94
Mills v. Fowkes (1839) 5 Bing. N. C. 455	114
Mills v. Hayward (1877) 6 Ch. D. 196	126

TABLE OF CASES

xix

Millward <i>v.</i> Littlewood (1850) 20 L. J. Ex. 2	129
Milward <i>v.</i> Earl of Thanet (1801) 5 Ves. 720	126
Molyneux <i>v.</i> Richard [1905] W. N. 164	127
Mondel <i>v.</i> Steel (1841) 8 M. & W. 858	124
Moore <i>v.</i> Voughton (1816) 1 Stark. 487	116
Morgan <i>v.</i> Milman (1853) 3 De G. M. & G. 33	99
Morton <i>v.</i> Lamb (1797) 7 T. R. 125	134
Moseley <i>v.</i> Virgin (1796) 3 Ves. 184	127
Mullens <i>v.</i> Miller (1882) 22 Ch. D. 194	126
Nash <i>v.</i> Armstrong (1861) 10 C. B. N. S. 259	145
Nash <i>v.</i> Hodgson (1855) 6 De G. M. & G. 474	113
Neale <i>v.</i> Ratcliff (1850) 15 Q. B. 916	135
Nerot <i>v.</i> Wallace (1789) 3 T. R. 17	95
Newstead <i>v.</i> Searles (1737) 1 Atk. 265	104
Nickoll <i>v.</i> Ashton, Edridge & Co. [1901] 2 K. B. (C. A.) 126	130
Nordenstrom <i>v.</i> Pitt (1845) 13 M. & W. 723	116
North <i>v.</i> Wakefield (1849) 13 Q. B. 541	155
Norton <i>v.</i> Ellam (1837) 2 M. & W. 463	108, 115
Nowlan <i>v.</i> Ablett (1835) 2 C. M. & R. 54	146
Nutbrown <i>v.</i> Thornton (1804) 10 Ves. 161	125
Offord <i>v.</i> Davies (1862) 12 C. B. N. S. 748	88
Ogilvie <i>v.</i> Foljambe (1817) 3 Mer. 53	101
Oldershaw <i>v.</i> Holt (1840) 12 A. & E. 590	124
Oldershaw <i>v.</i> King (1857) 2 H. & N. 524	95
Owen <i>v.</i> Homan (1851) 3 Mac & G. 378	149
Owen <i>v.</i> Homan (1853) 4 H. L. C. 997	152
Owen <i>v.</i> Thomas (1834) 3 My. & K. 353	101
Page <i>v.</i> Newman (1829) 9 B. & C. 378	116
Paradine <i>v.</i> Jane (1647) Aleyn, 26	130
Parfitt <i>v.</i> Chambre (1872) L. R. 15 Eq. 36	138
Parkin <i>v.</i> Thorold (1852) 16 Beav. 59	148
Parry <i>v.</i> Great Ship Co. (1863) 4 B. & S. 566	105
Pattinson <i>v.</i> Luckley (1875) L. R. 10 Ex. 330	149
Pearce <i>v.</i> Gardner [1897] 1 Q. B. 688	102
Pearce <i>v.</i> Watts (1875) L. R. 20 Eq. 492	87
Peeters <i>v.</i> Opie (1672) 2 Wms. Saund. 350	134
Peter <i>v.</i> Compton (1693) Skinn. 353	98
Petre <i>v.</i> Duncombe (1851) 20 L. J. Q. B. 242	118
Phillips <i>v.</i> L. & S. W. Ry. Co. (1879) 5 C. P. D. 280	123
Phillipotts <i>v.</i> Clifton (1861) 10 W. R. 135	109
Philpott <i>v.</i> Jones (1834) 2 A. & E. 41	114
Piercy <i>v.</i> Fynney (1871) L. R. 12 Eq. 69	158
Pigot's Case (1614) 11 Rep. 27 b	149
Pinchon's Case (1612) 9 Rep. 86 b	111
Pinnell's Case (1602) 5 Rep. 117	95
Polglass <i>v.</i> Oliver (1831) 2 Cr. & J. 15	107, 108
Poole <i>v.</i> Tunbridge (1837) 2 M. & W. 223	112
Pordage <i>v.</i> Cole (1669) 1 Wms. Saund. 319	134
Potter <i>v.</i> Duffield (1874) L. R. 18 Eq. 4	101
Powell <i>v.</i> Broadhurst [1901] 2 Ch. 164	157, 158

Prehn <i>v.</i> Royal Bank of Liverpool (1870) L. R. 5 Eq. 92	123
Preston <i>v.</i> Luck (1884) 27 Ch. D. 216	126
Price <i>v.</i> Easton (1833) 4 B. & Ad. 433	103
Price <i>v.</i> Moulton (1851) 20 L. J. C. P. 102	149
Prince <i>v.</i> The Oriental Bank (1878) L. R. 3 App. Ca. 325	149
Prior <i>v.</i> Hembrow (1841) 8 M. & W. 889	156
Pust <i>v.</i> Dowie (1863) 32 L. J. Q. B. 179; (1865) 5 B. & S. 33	135, 147
Raitt <i>v.</i> Mitchell (1815) 4 Campb. 146	105
Ramsden <i>v.</i> Dyson (1866) L. R. 1 H. L. 129	121
Ramsgate Hotel Co. <i>v.</i> Montefiore (1866) L. R. 1 Ex. 109	88
Rann <i>v.</i> Hughes (1778) 7 T. R. 350	92
Rayner <i>v.</i> Stone (1762) 2 Eden, 128	127
Redgrave <i>v.</i> Hurd (1881) 20 Ch. D. 1	126
Reg. <i>v.</i> Essex C. C. (1887) 18 Q. B. D. 704	117
Reynolds <i>v.</i> Bridge (1856) 6 E. & B. 540	139
Richards <i>v.</i> Heather (1817) 1 B. & Ald. 35	154
Richardson <i>v.</i> Barnes (1849) 4 Exch. 128	105
Richardson <i>v.</i> Jackson (1841) 8 M. & W. 298	109
Richardson <i>v.</i> Mellish (1824) 2 Bing. 229	123
Richardson <i>v.</i> Rowntree [1894] A. C. 217	88
Ridgeway <i>v.</i> Wharton (1853) 3 De G. M. & G. 677; (1857) 6 H. L. C. 238	101, 102
Rigby <i>v.</i> Connol (1880) 14 Ch. D. 487	127
Roberts <i>v.</i> Brett (1856) 18 C. B. 561	134, 135
Robinson <i>v.</i> Cook (1815) 6 Taunt. 336	108
Robinson <i>v.</i> Davison (1871) L. R. 6 Ex. 269	130, 131
Robinson <i>v.</i> Harman (1848) 1 Ex. 855	121
Roseorla <i>v.</i> Thomas (1842) 3 Q. B. 234	94
Rossiter <i>v.</i> Miller (1878) L. R. 3 App. Ca. 1124	91, 101
Routledge <i>v.</i> Grant (1828) 4 Bing. 653	89
Roxburghe <i>v.</i> Cox (1881) 17 Ch. D. 520	142
Ryan <i>v.</i> Mutual Tontine Association [1893] 1 Ch. (C. A.) 126	125, 126
Sainter <i>v.</i> Ferguson (1849) 7 C. B. 619	137, 138
Sard <i>v.</i> Rhodes (1836) 1 M. & W. 153	151
Saunders <i>v.</i> Wakefield (1821) 4 B. & Ald. 595	107
Saunderson <i>v.</i> Jackson (1800) 2 B. & P. 238	101
Scarf <i>v.</i> Jardine (1882) L. R. 7 App. Ca. 351	144
Schmalting <i>v.</i> Thomlinson (1815) 6 Taunt. 147	103
Schneider <i>v.</i> Norris (1814) 2 M. & S. 286	101
Scott <i>v.</i> Bevan (1831) 2 B. & Ad. 78	110
Searles <i>v.</i> Sadgrave (1855) 5 E. & B. 639	109
Shardlow <i>v.</i> Cotterell (1881) 20 Ch. D. 90	101
Shirley <i>v.</i> Stratton (1785) 1 Bio. Ch. 440	126
Sievewright <i>v.</i> Archibald (1851) 17 Q. B. 114	102
Simpson <i>v.</i> Crippin (1872) L. R. 8 Q. B. 14	148
Simpson <i>v.</i> L. & N. W. Ry. Co. (1876) 1 Q. B. D. 274	122
Simson <i>v.</i> Ingham (1823) 2 B. & C. 65	113
Slingsby's Case (1588) 5 Rep. 18	156
Sloman <i>v.</i> Walter (1784) 1 Bro. C. C. 418	136
Smith <i>v.</i> Gold Coast Ltd. [1903] 1 K. B. 285	98
Smith <i>v.</i> Tromsdale (1854) 3 E. & B. 83	151

TABLE OF CASES

xxi

Smith v. Wilson (1807) 8 East, 437	106
Smith v. Woodfine (1857) 1 C. B. N. S. 669	122
Smyth, ex parte (1818) 1 Swanst. 349	116
Soper v. Arnold (1889) L. R. 14 App. Ca. 435	136
Sparrow v. Paris (1862) 7 H. & N. 599	138
Startup v. Macdonald (1843) 6 M. & G. 593	106, 113, 144
State Fire Insee. Co. (1864) 2 H. & M. 722	117
Stavers v. Curling (1836) 3 Scott, 740	134
Steeds v. Steeds (1889) 22 Q. B. D. 537	145, 157, 158
Stevens v. Webb (1835) 7 C. & P. 62	131
Stewart v. Kennedy (1890) L. R. 15 App. Ca. 108	126
Stocks v. Dobson (1853) 4 De G. M. & G. 15	142
Street v. Blay (1831) 2 B. & Ad. 456	124
Stucley, re (1905) XXII T. L. R. 33	119
Suffell v. Bank of England (1881) 7 Q. B. D. 270; 9 Q. B. D. (C. A.)	149
555	118
Sutton v. Morgan (1814) 5 Taunt. 758	120, 146
Synge v. Synge [1894] 1 Q. B. 466	
Tamplin v. James (1880) 15 Ch. D. 216	126
Taylor v. Brewer (1813) 1 M. & S. 290	87
Taylor v. Brown (1830) 2 Beav. 180	147
Taylor v. Caldwell (1863) 3 B. & S. 826	130, 132
Taylor v. G. E. Ry. Co. [1901] 1 K. B. 779	86
Taylor v. Laird (1856) 25 L. J. Ex. 329	88
Taylor v. Smith [1893] 2 Q. B. (C. A.) 65	102
Tetley v. Wanless (1867) L. R. 2 Ex. 275 (Ex. Ch.)	151
Teutonia, The (1872) L. R. 4 P. C. 171	132
Thomson v. Eastwood (1877) L. R. 2 App. Ca. 215	94
Thornhill v. Neats (1860) 8 C. B. N. S. 831	144
Thornborow v. Whitacre (1705) 2 Lord Raym. 1164	95, 133
Thorne v. Smith (1851) 10 C. B. 659	154
Thornton v. Jenkyns (1840) 1 M. & G. 166	94
Tolhurst v. Assoc. Cement Manufacturers [1902] 2 K. B. 660; [1903] A. C. 414	141, 143
Torington v. Magee [1902] 2 K. B. 430	141
Tourret v. Cripps (1879) 48 L. J. Ch. 567	101
Tucker v. Linger (1883) L. R. 8 App. Ca. 508	105
Tweddle v. Atkinson (1861) 1 B. & S. 393	103, 104
Tyser v. The Shipowners' Syndicate (1896) 1 Q. B. 135	154
Underhill v. Horwood (1804) 10 Ves. 226	156
Underwood v. Underwood [1894] P. (C. A.) 204	152
Vanderbergh v. Spooner (1866) L. R. 1 Ex. 316	101
Vyse v. Wakefield (1840) 6 M. & W. 452	115
Wade's Case (1600) 5 Rep. 115	108
Wain v. Warlters (1804) 5 East, 10	100, 101
Walker v. Bradford Old Bank (1884) 12 Q. B. D. 511	142
Wallace v. Kelsall (1840) 7 M. & W. 264	157
Wallis v. Smith (1882) 21 Ch. D. 243	121, 138, 139
Walrond v. Walrond (1858) Johns. 18	96, 139

Walton <i>v.</i> Mascall (1844) 13 M. & W.	458	115
Ward <i>v.</i> National Bank of New Zealand (1883) L. R. 8 App. Ca.	755	153
Ware <i>v.</i> Chappell (1649) Style	186	134
Watson <i>v.</i> Mid-Wales Ry. Co. (1867) L. R. 2 C. P.	593	143
Webster <i>v.</i> Cecil (1861) 30 Beav.	62	127
Weinberg <i>v.</i> Ogdens Ltd. (1905) XXII. T. L. R.	58	141
Wells <i>v.</i> Foster (1841) 8 M. & W.	151	95
Westlake <i>v.</i> Adams (1858) 5 C. B. N. S.	265	94
Whincup <i>v.</i> Hughes (1871) L. R. 6 C. P.	78	132
Whitbread <i>v.</i> Watt [1901] 1 Ch. 911; [1902] 1 Ch.	835	119
White <i>v.</i> Beeton (1861) 7 H. & N.	50	135
White <i>v.</i> Bluett (1853) 23 L. J. Ex.	36	87
White <i>v.</i> Tyndall (1888) L. R. 13 App. Ca.	263	153, 155, 157
Whitwood Chemical Co. <i>v.</i> Hardman [1891] 2 Ch. (C. A.)	416	128
Wild <i>v.</i> Harris (1849) 7 C. B.	999	129
Wilkinson <i>v.</i> Johnson (1824) 3 B. & C.	428	149
Wilkinson <i>v.</i> Lindo (1840) 7 M. & W.	81	158
Wilkinson <i>v.</i> Oliveira (1835) 1 Bing. N. C.	490	94
Willatts <i>v.</i> Kennedy (1831) 8 Bing.	5	94
Williams <i>v.</i> Carwardine (1833) 4 B. & Ad.	621	91
Williams <i>v.</i> Sorrell (1799) 4 Ves.	389	142
Williams <i>v.</i> Stern (1879) 5 Q. B. D. (C. A.)	409	145
Wills <i>v.</i> Murray (1850) 4 Exch.	865	111
Wilson <i>v.</i> London Navigation Co. (1865) L. R. 1 C. P.	61	135
Wolverhampton Corpn. <i>v.</i> Emmons [1901] 1 Q. B.	515	127
Wolverhampton Ry. Co. <i>v.</i> L. & N. W. Ry. Co. (1873) L. R. 16 Eq.	439	127
Wood <i>v.</i> Scarth (1855) 2 K. & J.	33	126
Worsley <i>v.</i> Wood (1796) 6 T. R.	710	107
Wright <i>v.</i> Barlow (1815) 3 M. & S.	512	96
Wright <i>v.</i> Laing (1824) 3 B. & C.	165	114
Xenas <i>v.</i> Wickham (1866) L. R. 2 H. L.	296	97
Young <i>v.</i> Mayor etc. of Leamington (1883) L. R. 8 App. Ca.	517	96

BOOK II

O B L I G A T I O N S

PART I

OBLIGATIONS ARISING FROM CONTRACT

(GENERAL)

SECTION I

FORMATION OF CONTRACT

TITLE I—OFFER AND ACCEPTANCE

182. A contract is an agreement which creates, *Contract* or is intended to create, a legal obligation between the parties to it.

183. A contract which does not create a legal *Void* obligation between the parties is termed a “void” *contract* contract.

184. A contract which one or more of the parties *Voidable* thereto may affirm or avoid at his or their option is *contract* termed a “voidable” contract.

*Unenforce-
able contract*

185. A contract upon which an action cannot be maintained by one of the parties thereto is said to be unenforceable by that party.

Taylor v. G. E. Ry. Co. [1901] 1 K. B. at p. 779.

[For examples of unenforceable contracts see Book I, §§ 158–175 (Limitation of Actions) and §§ 220, 222 below (Statute of Frauds, s. 4; Sale of Goods Act 1893, s. 4). In the case of a statute-barred claim, the contract has become unenforceable by lapse of time. But it is not avoided, and may be revived without fresh consideration in accordance with Book I, §§ 160–162. The classes of contracts specified in §§ 220 and 222 (below) are unenforceable unless they are in writing, or otherwise satisfy the statutory requirements (§ 222). Nevertheless, even though the requisite evidence of their existence is wanting, they are valid contracts. They create obligations and produce most of the legal consequences of contracts, so that (e.g.) if the contract is for the sale of specific goods, the property in the goods passes to the buyer (per Bigham J., *Taylor v. G. E. Ry. Co.* [1901] 1 K. B., at p. 779). They may be rendered enforceable *ex post facto* by written evidence forthcoming at any time before action brought (See Addendum to Title II of this Section). Finally, neither the lapse of time nor the absence of writing is available as a defence, unless expressly raised by the pleadings.]

*Non-
contractual
engagements*

186. There is no contract if it is to be gathered from the language or acts of the parties, or from the circumstances of the case, that the parties did not intend to create a legal obligation between them.

[There is little direct authority for this proposition; but it is presumed that a purely social engagement, e.g. of two persons to dine together, does not produce legal consequences. This is sometimes expressed by the phrase, that an agreement which is to produce legal consequences must be an “act in the law.” (Pollock, *Principles of Contract*, 7th ed. p. 3.)]

187. There is no contract if it is impossible to gather from the language or acts of the parties, or from the circumstances of the case, the nature and content of the obligation intended to be created. *Vague promises*

White v. Bluet (1853) 23 L. J. Ex. 36.

Pearce v. Watts (1875) L. R. 20 Eq. 492.

188. There is no contract if it is left to one of the parties to determine the character or amount of the performance due from him. *Uncertain promise*

Taylor v. Brewer (1813) 1 M. & S. 290.

189. A contract is concluded when one party has communicated to another an offer, and that other has accepted it, or when the parties have united in a concurrent expression of intention, designed to create a legal obligation. *Making of contract*

[Our older law-writers pay little attention to offer and acceptance as constituent elements of contract. (See, for instance, Blackstone, *Comm.* II, pp. 442 ff.) It appears that in English law there may be contracts which do not arise from the acceptance of a preceding offer. Thus, a lease is at once a conveyance and a contract. So far as it is a contract, we must look for the terms of the contract within the instrument itself; for rules of evidence preclude us in general from supplementing or varying the written contract by reference to the negotiations which preceded it. The deed is not merely evidence of the contract, but is the contract. Antecedent discussion therefore, even though it may have resulted in a contract, viz. in an agreement for a lease, is inadmissible, as regards the lease itself, to point to one party more than to the other as offeror or acceptor. In such a case, the union of minds takes the form, not of the acceptance of an offer, but of a concurrent expression of intention. (See Pollock, *Principles of Contract*, 7th ed. pp. 6-7.)]

Offer

190. The communication of an offer takes place when it is brought to the knowledge of the person to whom it is made.

Taylor v. Laird (1856) 25 L. J. Ex. 329.

Richardson v. Rowntree [1894] A. C. 217.

*Mode of
communication*

191. Subject to special rules of law, an offer may be communicated either by words (spoken or written), or by conduct, or partly by words and partly by conduct.

Hart v. Mills (1846) 15 M. & W. 87.

*When offer
binding*

192. An offer does not bind the offeror until acceptance, and may lapse or be revoked at any time before acceptance.

Offord v. Davies (1862) 12 C. B. N. S. 748.

Dickinson v. Dodds (1876) 2 Ch. D. 463.

*Lapse of
offer*

193. An offer lapses when (a) the person to whom it is made fails to accept it within the time or in the manner prescribed by the offeror, or, if no time or manner is prescribed, within a time or in a manner reasonable under the circumstances, (b) the offeree communicates his refusal of the offer, or makes a counter-offer, (c) either party dies.

(a) *Baily's Case* (1868) L. R. 5 Eq. 428. *Ramsgate Hotel Co. v. Montefiore* (1866) L. R. 1 Ex. 109.

(b) *Hyde v. Wrench* (1840) 3 Beav. 334.

(c) *Dickinson v. Dodds* (1876) 2 Ch. D. at p. 475 (death of offeror).
Duff's Exors' Case (1886) 32 Ch. D. 301 (death of offeree).

194. An offer is revoked when the offeror makes known to the offeree that it is no longer open to him to accept it. An offer is deemed to be revoked when the offeror renders it impossible for himself to act or forbear in terms of his offer, and the offeree learns of this, even from a third party, before acceptance. *Revocation of offer*

Dickinson v. Dodds (1876) 2 Ch. D. 463.
Byrne v. Van Tienhoven (1880) 5 C. P. D. 344.
Henthorn v. Fraser [1892] 2 Ch. 27.

[The second part of the above rule is rendered necessary by the decision of the Court of Appeal (James and Mellish, L. JJ. Baggallay, J. A.) in *Dickinson v. Dodds* (1876) 2 Ch. D. 463. This decision has been adversely criticised, but must be accepted as a correct statement of the law until the House of Lords has an opportunity in some future case of determining whether it rightly interpreted the law.]

195. Even if an offeror prescribes a time for acceptance, he may nevertheless revoke the offer at any time before acceptance; but if he has entered into an independent contract not to do so, he will be liable for a breach of such contract. *Offer always revocable*

Routledge v. Grant (1828) 4 Bing. 653.
Bristol Bread Co. v. Maggs (1890) 44 Ch. D. 616.

196. Acceptance takes place when the offeree expresses his acceptance of the offer in the manner prescribed by the offeror, or, in default of this, in *Acceptance*

a manner reasonable in the circumstances; but, in the last case, subject to the provisions of § 198, acceptance is not complete until it is communicated to the offeror.

MacIver v. Richardson (1813) 1 M. & S. 557.

Brogden v. Metro. Ry. Co. (1877) L. R. 2 App. Ca. 666.

Adams v. Lindsell (1818) 1 B. & Ald. at p. 683.

*Mode of
acceptance*

Subject as aforesaid, and to special rules of law, acceptance may be communicated either by words (spoken or written), or by conduct, or partly by words and partly by conduct.

*Ineffectual
acceptance*

197. An acceptance which does not correspond with the terms of an offer is ineffectual. If the offeree purports to accept subject to conditions, additions, restrictions, or alterations, his purported acceptance counts as a refusal of the original offer and as a new offer. A purported acceptance made after an offer has lapsed or been revoked (probably) counts as a new offer.

Hyde v. Wrench (1840) 3 Beav. 334.

Lucas v. James (1849) 7 Hare, 410.

*Acceptance
by post*

198. If acceptance through the post is expressly or by implication prescribed or permitted by the offeror, acceptance is made, and the contract is concluded, at the moment when an acceptance is duly posted for

transmission to the offeror, even though the acceptance is delayed or lost in the post.

Household Fire Insurance Co. v. Grant (1879) 4 Ex. D. 216.

Cowan v. O' Connor (1888) 20 Q. B. D. 640.

Hentborn v. Fraser [1892] 2 Ch. 27.

In re London & Northern Bank [1900] 1 Ch. 220.

199. When it is to be gathered from an offer, *General offer* (whether made to a definite person or persons or to persons generally,) that the offeror intends to be bound to the person who acts or forbears in terms of the offer without previous communication of acceptance, the person so acting or forbearing accepts the offer, when he so acts or forbears with the knowledge of the offeror.

Williams v. Carwardine (1833) 4 B. & Ad. 621.

Ex p. Asiatic Banking Co. (1867) L. R. 2 Ch. App. 391.

Brogden v. Metro. Ry. Co. (1877) L. R. 2 App. Ca. at p. 691.

Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q. B. (C. A.) 256.

200. If the parties to a contract have agreed that *Inchoate contracts* their contract is to be put into a particular form, it is a question of fact in each case whether they intend that no obligation shall arise until the contract is put into such form. The mere fact that the parties have so agreed does not prevent them from being bound, if they intended to be so, and if they are at one as regards the terms of the proposed contract.

Chunnock v. The Marchioness of Ely (1865) 4 D. J. & S. 638.

Rossiter v. Miller (1878) L. R. 3 App. Ca. 1124.

Lloyd v. Nowell [1895] 2 Ch. 744.

TITLE II — FORM AND CONSIDERATION

*Specialty
and simple
contracts*

201. All contracts are either : —

(*a.*) in writing under seal (“specialty” contracts)

or

(*b.*) otherwise expressed (“parol” or “simple” contracts).

Rann v. Hughes (1778) 7 T. R. 350 n.

*Promisor
and
promisee*

202. Every contract contains a promise or promises.

The person who makes a promise is termed “the promisor.”

The person to whom a promise is made is termed “the promisee.”

In a contract containing reciprocal promises, each party is at the same time promisor and promisee.

[In the case of a specialty contract, the promise is termed a “covenant,” and the promisor and promisee are termed “covenantor” and “covenantee” respectively. In the case of a bond, the corresponding terms are “obligor” and “obligee.”]

*Nudum
pactum*

203. No simple contract is binding upon a party to it unless he receives consideration for his promise.

Rann v. Hughes, ubi sup.
Cook v. Oxley (1790) 3 T. R. 650.

204. Except as hereinafter mentioned, a party to a contract is said to receive consideration for his promise when the promisee does, forbears, or suffers, or promises to do, forbear, or suffer, something in exchange for, and at the time of, the promise made to him. *Valuable consideration*

Jones v. Ashburnham (1804) 4 East, 455.

Currie v. Misa (1875) L. R. 10 Ex. at p. 162.

Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q. B., at p. 264.

[The existence of a blood or marriage relationship between the parties is often described as "good consideration." But this kind of consideration, though of importance in other branches of the law, is not recognized by the Law of Contract, which demands "valuable consideration."]

205. When a consideration consists in something done, forborne, or suffered, it is said to be "executed;" when a consideration consists in a promise to do, forbear, or suffer, it is said to be "executory." An executory consideration becomes executed upon performance. *Executed and executory considerations*

¶ Formerly the terms "executed" and "executory" were often applied to the contract itself. This practice is to be deprecated. Every contract is, in its nature, executory. When it has been completely executed, it ceases to exist. ED.]

206. Subject to the rules relating to the revival of statute-barred debts, an antecedent act, forbearance, or promise, of one party is no consideration for a subsequent promise of the other party, nor is a subsequent act, forbearance, or promise of one party *Past consideration*

any consideration for an antecedent promise of the other.

Hopkins v. Logan (1839) 5 M. & W. 241.

Roscorla v. Thomas (1842) 3 Q. B. 234.

Kaye v. Dutton (1844) 7 M. & Gr. 807.

[It is sometimes said that an antecedent act or forbearance may be consideration for a subsequent promise, if the antecedent act or forbearance was done or forborne at the promisor's request. (See *Hunt v. Bate* (1568) 3 Dyer 272a; *Lampleigh v. Braithwait* (1614) Hob. 105; *Thornton v. Jenkyns* (1840) 1 M. & G. 166.) But *quaere* whether this is so, unless the request in substance amounts to an offer, the terms of which are repeated or ascertained in the subsequent undertaking. (*Wilkinson v. Oliveira* (1835) 1 Bing. N. C. 490; *Kennedy v. Brown* (1863) 13 C. B. N. S. 677.)]

. Inadequacy
of con-
sideration

207. It is not necessary that the consideration should be of equal value with the promise in respect of which it is given.

Haigh v. Brooks (1839) 10 A. & E. 309.

Westlake v. Adams (1858) 5 C. B. N. S., at p. 265.

Bolton v. Madden (1873) L. R. 9 Q. B. 55.

Abandon-
ment of
claims

208. The abandonment of a right or *bonâ fide* claim, even though unfounded, or the forbearance to exercise the right or to assert the claim for a definite or reasonable time, may be a valid consideration for a promise.

Willatts v. Kennedy (1831) 8 Bing. 5.

Matber v. Lord Maidstone (1856) 18 C. B. 273.

Cook v. Wright (1861) 1 B. & S. 559.

Callisber v. Bischoffsheim (1879) L. R. 5 Q. B. 449.

Miles v. New Zealand Alford Estate Co. (1886) 32 Ch. D. (C. A.) 266.

[*Quaere*, if the claim abandoned is wholly unreasonable (*Thomson v. Eastwood* (1877) L. R. 2 App. Ca. 215) or utterly untenable (*Chapman v. Franklin* (1905) XXI T. L. R. 515.)]

209. What is a reasonable time within the meaning of § 208, is a question of fact in each case. *Reasonable time*

Oldershaw v. King (1857) 2 H. & N., at p. 524.

210. When, by reason of a general rule of law or of a subsisting obligation, one party already owes to another an act or forbearance, such act or forbearance, or the promise thereof in whole or in part, is no consideration for a promise by that other. *Nugatory considerations*

Pinnell's Case (1602) 5 Rep. 117.

Fitch v. Sutton (1804) 5 East, 230.

Crowhurst v. Laverack (1852) 8 Exch. 208.

Fraser v. Hatton (1857) 2 C. B. N. S. 512.

211. An act or forbearance which is contrary to law, morality, or public policy, or the promise thereof, is no consideration. *Improper considerations*

Collins v. Blanton (1766) 2 Wils. 341.

Nerot v. Wallace (1789) 3 T. R. 17.

Jones v. Asbburnham (1804) 4 East, 455.

Levy v. Yates (1838) 8 A. & E. 129.

Wells v. Foster (1841) 8 M. & W. 151.

212. A promise is no consideration when the thing promised is at the time of the promise either contrary to the course of nature or impossible in law. *Impossible considerations*

Harvey v. Gibbons (1675) 2 Lev. 161.

Thornborough v. Whitacre (1705) 2 Lord Raym. 1164.

Faulkner v. Lowe (1848) 2 Exch. 595.

Clifford v. Watts (1871) L. R. 5 C. P., at p. 588

*Specialty
contract*

213. A specialty contract without consideration is valid; but, in case of breach, the promisee can only obtain damages, not specific performance or injunction.

Jefferys v. Jefferys (1841) Cr. & Ph. 138.

Walrond v. Walrond (1858) Johns. 18.

In re Lucan (1890) 45 Ch. D. 470.

Legal form

214. If a contract is required by law to be expressed in writing under seal, then, in the absence of provision to the contrary, no obligation arises unless the contract is expressed accordingly.

Lamprell v. Billericay Union (1849) 3 Exch. 283.

Young v. Mayor etc. of Leamington (1883) L. R. 8 App. Ca. 517.

Formal contract

215. A specialty contract must be wholly written or printed, or partly written and partly printed, on paper or parchment, sealed and delivered by, or by the direction of, the party executing it.

Sheppard, *Touchstone*, p. 54.

[Signing, though invariable in practice, is not essential (*ex parte Hodgkinson* (1815) 19 Ves. at p. 295). Attestation, though usual, is only essential where it is expressly required by law or by the special authority under which the deed is executed.

Wright v. Barlow (1815) 3 M. & S. 512.

Freshfield v. Reed (1842) 9 M. & W. 404.

Harben v. Phillips (1883) 23 Ch. D. (C. A.) 14.]

*Delivery
of specialty
contract*

216. A specialty contract is said to be delivered when the promisor (*a*) transfers possession of it to the promisee or to a third party on his behalf with the intention that it shall take effect as his act and

deed (*b*) declares such intention otherwise by sufficient words or conduct.

Sheppard, *Touchstone*, pp. 57, 58.

Xenos v. Wickham (1866) L. R. 2 H. L. at p. 312.

217. A specialty contract may be delivered subject to a suspensive condition (Book I, § 110). It is then termed an “escrow.”

Escrow

Xenos v. Wickham (1866) L. R. 2 H. L. at p. 323.

218. If a specialty contract is to be executed by more than one party, it is sufficient if each party executes a duplicate (“counter-part”).

Counter-
parts

219. If a specialty contract is unilateral, it binds the promisor from the moment of delivery, even though the promisee is unaware of its existence; but if the promisee, upon receiving notice of its execution, repudiates it, the contract becomes void *ab initio*. A unilateral contract need not be executed by the promisee.

Unilateral
contracts

Butler's and Baker's Case (1591) 3 Rep. 25.

Hall v. Palmer (1844) 13 L. J. Ch. 352.

Fletcher v. Fletcher (1845) 14 L. J. Ch. 66.

Xenos v. Wickham (1866) L. R. 2 H. L. 296.

220. Subject to the provisions of § 221, a contract is unenforceable whereby a person (*a*) being an executor or administrator, expressly promises to answer damages out of his own estate; (*b*) ex-

Requirement
of writing

pressly promises to answer for the debt, default, or miscarriage of another; (*c*) makes a promise in consideration of marriage; (*d*) promises to transfer any interest in lands tenements or hereditaments; (*e*) makes a promise the performance of which must extend, as regards both parties to it, beyond the period of one year from the making thereof; unless the contract sought to be enforced, or some memorandum or note thereof is in writing, signed by the party against whom it is sought to be enforced, or by some other person thereunto by him lawfully authorised.

Statute of Frauds (1677) s. 4.

(*b*) This clause applies only to contracts of guarantee, not to contracts of indemnity. *Birkmyr v. Darnell* (1705) 1 Salk. 27.

(*c*) Mutual promises of marriage do not fall within this clause. *Cork v. Baker* (1716) 1 Stra. 34.

(*e*) *Peter v. Compton* (1693) Skinn. 353.

Donellan v. Read (1832) 3 B. & Ad. 899.

[The fact that a contract is determinable within the year, does not prevent it falling within this clause (*Birch v. Liverpool* (1829) 9 B. & C. 392). A contract to serve for a year from to-morrow is not within the clause (*Smith v. Gold Coast L^d* [1903] 1 K. B. 285.)]

*Part per-
formance*

221. If, in the case of any such contract, (*a*) there has been part performance by the person seeking to enforce it, the acts of part performance being unequivocally referable to some such contract as that alleged; (*b*) the alleged contract is such as would, if in writing, be specifically enforceable under the equitable jurisdiction of the Court; (*c*) it would under the circumstances be fraudulent in the defendant to avail himself of the absence of writing; and

(d) the contract can be sufficiently proved by parol evidence; a defendant to an action for specific performance or other equitable relief may not avail himself of the absence of writing as a ground of defence.

- (a) *Forster v. Hale* (1798) 3 Ves. at p. 712, per Lord Alvanley M. R.
Dale v. Hamilton (1846) 5 Hare, at p. 381, at p. 148, per Wigram V. C.
Caton v. Caton (1865) L. R. 1 Ch. App. per Lord Cranworth L. C.
Maddison v. Alderson (1883) L. R. 8 App. Ca. 479. Cf. *Gray v. Smith* (1889) 43 Ch. D. 208.
- (b) *Britain v. Rossiter* (1882) 11 Q. B. D. 123.
McManus v. Cooke (1887) 35 Ch. D. 697.
Fry, Specific Performance (4th) p. 262.
- (c) *Caton v. Caton* (1865) L. R. 1 Ch. App. 137.
Morgan v. Milman (1853) 3 De G. M. & G. 33.

222. A contract for the sale of any goods of the value of £10 or upwards is not enforceable by action unless the buyer accepts part of the goods so sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party against whom it is sought to be enforced, or his agent in that behalf.

*Sale of
goods above
£10*

Sale of Goods Act, 1893, s. 4. subs. 1.

223. The provisions of the last § apply, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or that some act

*Meaning of
"goods",*

may be requisite for the making or completing thereof, or rendering the same fit for delivery.

Sale of Goods Act, 1893, s. 4, subs. 2.

*Acceptance
of goods*

224. There is an acceptance of goods within the meaning of § 222, when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not.

Sale of Goods Act, 1893, s. 4, subs. 3.

*Indirect en-
forcement*

225. A contract, unenforceable by action owing to the absence of the requirements of §§ 220 and 222, may nevertheless be valid in other respects.

Leroux v. Brown (1852) 12 C. B. 801.

Britain v. Rossiter (1882) 11 Q. B. D. 123.

Maddison v. Alderson (1883) L. R. 8 App. Ca., at p. 474.

Taylor v. G. E. Ry. Co. [1901] 1 K. B., at p. 779.

*Marine
insurance*

226. A contract of marine insurance (other than such insurance as is referred to in s. 506 of the Merchant Shipping Act, 1894,) is not valid unless it is expressed in the form of a policy.

Stamp Act, 1891, s. 93.

ADDENDUM TO TITLE II.

*Meaning of
“note or
memoran-
dum”*

[In §§ 220 and 222 the words “note or memorandum in writing” include any printed or written documents, from which all the terms of the contract may be collected (a); more especially the

(a) *Wain v. Warlters* (1804) 5 East, 10.

parties ^(b), the subject matter ^(c), and the consideration ^(d) for the promise of the party sued. But, in the case of a contract to answer for the debt default or miscarriage of another, it is not required that the consideration should appear in writing ^(e).

- (b) *Bailey v. Sweeting* (1861) 9 C. B. N. S. 843.
Vandenberg v. Spooner (1866) L. R. 1 Ex. 316.
- (c) *Shardlow v. Cotterell* (1881) 20 Ch. D. 90.
- (d) *Wain v. Warlters, ubi sup.*
Saunders v. Wakefield (1821) 4 B. & Ald. 595.
- (e) Mercantile Law Amendment Act, 1856, s. 3.

When the contract is to be gathered from several documents, it is sufficient if the person sued has signed one document which incorporates, directly or by reference, the essential terms ^(f). It is not necessary that the signature should be placed at the end of the document; but it must be of such a character and so placed as to connect the signer with the whole of the contract ^(g). A name printed upon a document may constitute a sufficient signature for the purpose of these §§ ^(h). *Several documents*

- (f) *Ridgway v. Wharton* (1857) 6 H. L. C. 238.
Jones v. Victoria Graving Dock Co. (1877) 2 Q. B. D. 314.
- (g) *Johnson v. Dodgson* (1837) 2 M. & W. 659.
Foster v. Mentor Life Assurance Co. (1854) 3 E. & B. 48.
Caton v. Caton (1867) L. R. 2 H. L. 127.
- (h) *Saunderson v. Jackson* (1800) 2 B. & P. 238.
Schneider v. Norris (1814) 2 M. & S. 286.
Touret v. Cripps (1879) 48 L. J. Ch. 567.

It is sufficient if the parties, though not named, are so described that they can be identified easily and certainly ⁽ⁱ⁾. For this purpose oral evidence is admissible. The same principle applies also to the subject matter ^(j) and to the consideration ^(k). It is not necessary that the documents containing the terms of the contract should have been made for the purpose of supplying evidence of the contract, if in fact they do so ^(l). *Description of parties*

- (i) *Potter v. Duffield* (1874) L. R. 18 Eq. 4.
Commins v. Scott (1875) L. R. 20 Eq. 15.
Rossiter v. Miller (1878) L. R. 3 App. Ca. 1124.
- (j) *Ogilvie v. Foljambe* (1817) 3 Mer. 53.
Owen v. Thomas (1834) 3 My. & K. 353.
McMurray v. Spicer (1868) L. R. 5 Eq. 527.
- (k) *Haigh v. Brooks* (1839) 10 A. & E. 309.
- (l) *Buxton v. Rust* (1872) L. R. 7 Ex. 1, and 279.

*Date of
writing*

It is immaterial that any or all ^(m) of the documents produced in evidence were made after the conclusion of the contract, or even with the object of repudiating it, provided that they are of such a character as to supply evidence of its terms ⁽ⁿ⁾ and were made before action brought ^(o). Oral evidence is admissible to connect two or more documents ^(p), provided that it obviously appears from the documents themselves that they refer to one another ^(q). It seems that letter and envelope may be treated as together constituting a single document ^(r).

- (m) *Sievwright v. Archibald* (1851) 17 Q. B., at p. 114.
- (n) *Bailey v. Sweeting* (1861) 9 C. B. N. S. 843.
- (o) *Bill v. Bament* (1841) 9 M. & W. 36.
Lucas v. Dixon (1889) 22 Q. B. D. 357.
- (p) *Ridgway v. Wharton* (1853) 3 De G. M. & G. 677.
Long v. Millar (1879) 4 C. P. D. 454.
Taylor v. Smith [1893] 2 Q. B. (C. A.) 65.
- (q) *Boydell v. Drummond* (1809) 11 East, 142.
- (r) *Pearce v. Gardner* [1897] 1 Q. B. 688.

SECTION II

PARTIES TO A CONTRACT

227. There must be at least two parties to every contract. *Two parties*

Faulkner v. Lowe (1848) 2 Exch. 595.
Grey v. Ellison (1856) 1 Giff. 438.

228. It is not essential that the identity of the promisee should be known to the promisor at the time of contracting; but no contract can exist except between definite persons. *Promisee unknown*

Kelsey v. Dodd (1881) 52 L. J. Ch. 39.
Ex parte Asiatic Banking Company (1867) L. R. 2 Ch. App. 391.

229. Subject to the law regarding the creation of trusts, and to the assignment of contracts by act of the parties and by operation of law, no person can acquire rights or incur contractual liabilities under a contract to which he is not a party. *Strangers to contract*

Price v. Easton (1833) 4 B & Ad. 433. }
Tweddle v. Atkinson (1861) 1 B. & S. 393. } (rights)
Eley v. Positive Life Assur. Co. (1876) 1 Ex. D. 88. }
Exall v. Partridge (1799) 8 T. R. 308. }
Schmaling v. Thomson (1815) 6 Taunt. 147. } (liabilities)

*Marriage
settlements*

230. When a settlement is made in contemplation of marriage, the children of the marriage may enforce any covenant for their benefit contained in the settlement.

Newstead v. Searles (1737) 1 Atk. 265.

Gale v. Gale (1877) 6 Ch. D. 11., 144.

[The rule appears to extend to the children of a widow by a former marriage (*Gale v. Gale*, *ubi sup.*). But see *A. G. v. Jacobs-Smith* [1895] 2 Q. B., at p. 349. It does not extend to the children of a widower (*Re Cameron & Wells* (1887) 37 Ch. D. 32).]

*Right to
sue*

231. Subject as aforesaid (§§ 229 & 230), the parties to a contract cannot, unless authorised by statute, confer upon a third person the right of maintaining or defending an action in respect of it in his own name.

Tweddle v. Atkinson (1861) 1 B. & S. 393.

Gray v. Pearson (1870) L. R. 5 C. P. 568.

SECTION III

PERFORMANCE OF CONTRACT

TITLE I.—DUTY OF PERFORMANCE

232. The parties to a contract must, unless legally *Performance* excused from performance, perform their respective duties under the contract.

Cranley v. Hillary (1813) 2 M. & S., at p. 122.
Haldane v. Johnson (1853) 8 Exch. 689.

233. The character and extent of the performance *Extent of* due from each party are determined by the words and *performance* conduct of the parties as interpreted by reference to usage and law.

Raitt v. Mitchell (1815) 4 Campb. 146.
Humfrey v. Dale (1857) 7 E. & B. 266.
Tucker v. Linger (1883) L. R. 8 App. Ca. 508.
Bl. Comm. III, 443.
Meyer v. Dresser (1864) 16 C. B. N. S. 660.

234. Performance must be complete, and strictly *Completion* in accordance with the terms of the contract. *of per-*
formance

Bird v. Smith (1848) 12 Q. B. 786.
Richardson v. Barnes (1849) 4 Exch. 128.
Parry v. Great Ship Co. (1863) 4 B. & S. 556.

*Conditions
precedent*

235. When the performance due from one party is such that it cannot be rendered without the concurrence of the other, the first-named party is deemed to have performed his duty, if he has tendered performance, and the other party has failed to accept it.

Startup v. Macdonald (1843) 6 M. & G., at p. 610.

This § applies to a tender of payment of a money debt, in so far as it is not inconsistent with §§ 239-245.

Jones v. Barkley (1781) 2 Dougl. 659.

Smith v. Wilson (1807) 8 East, 437.

Bankart v. Bowers (1866) L. R. 1 C. P. 484.

*Strictness of
tender*

236. Such tender must be unconditional, and strictly in accordance with the terms of the contract; and the party making it must do, or be ready and willing to do, everything necessary on his part to the complete performance of the contract.

Laing v. Meader (1824) 1 C. & P. 257.

Foord v. Noll (1842) 2 Dowl. N. S. 614.

*Mode of
tender*

237. A tender must be made at such time and in such manner as to give the person to whom it is made a reasonable opportunity of ascertaining whether it is made in accordance with the contract.

Isberwood v. Whitmore (1843) 11 M. & W. 347.

238. When performance depends upon the concurrence of a third person, it is no excuse for non-performance (in the absence of agreement to that effect between the parties) that the third person declines to concur. *Concurrence of third party*

Grey v. Hesketh (1755) Ambl. 268.
Worsley v. Wood (1796) 6 T. R. 710.
Perkins, Profitable Book, s. 756.

239. In the case of a money-debt, tender without payment does not discharge the debtor ; but tender of payment duly made, and followed by a continued readiness to pay, will, if the amount of the debt is paid into Court, be a good defence to an action for non-payment. *Tenders of money*

Dixon v. Clarke (1848) 5 C. B. , at p. 377.
Kinnaird v. Trollope (1889) 42 Ch. D. 610.

240. A tender of payment is not valid unless the money is actually produced, or the creditor expressly or by implication dispenses with production. *Production of money*

Douglas v. Patrick (1790) 3 T. R. 683.
Finch v. Brook (1834) 1 Scott, at p. 76.

241. Tender of payment must be made in current coin of the United Kingdom, Bank of England Notes, or in other medium authorised by law. *Medium of tender*

Polglass v. Oliver (1831) 2 Cr. & J. 15.

[Bank of England Notes are legal tender for any sum above five pounds, except by the Bank itself. (Bank of England Act, 1833, s. 6.)

By the Coinage Act, 1870, s. 4, gold coins are legal tender to any amount, silver coins up to forty shillings, bronze coins up to one shilling.

By s. 11 of the same Act, the Crown in Council is empowered to direct that coins coined in any foreign country shall be a legal tender, to direct the establishment of a branch of the Mint in any British possession, and to determine the extent to which coins issued therefrom are to be legal tender.

A tender in country bank-notes, or by a cheque on a banker, is good, if the creditor objects only to the amount and not to the quality of the tender. (*Polglass v. Oliver* (1831) 2 Cr. & J. 15; *Jones v. Arthur* (1840) 8 Dowl. 442).]

Change

242. If a debtor tenders a greater sum than is due, this is a good tender of the amount due; but the debtor may not demand change, and the creditor is not bound to give it.

Wade's Case (1600) 5 Rep. 115 a.

Douglas v. Patrick (1700) 3 T. R. 683.

Betterbee v. Davis (1811) 3 Campb. 70.

Robinson v. Cook (1815) 6 Taunt. 336.

Interest

243. A tender must include all interest, if any, due upon the debt. A tender duly made prevents the accrual of future interest.

Norton v. Ellam (1837) 2 M. & W., at p. 463.

Kinnaird v. Trollope (1889) 42 Ch. D. 610.

Bank of N. S. Wales v. O'Connor (1889) L. R. 14 App. Ca. p. 284.

Refusal of tender

244. A creditor who refuses a tender of payment on a specified ground, cannot afterwards justify his

refusal by alleging an objection which he did not put forward at the time of refusal.

Black v. Smith (1791) Peake, 88.

Richardson v. Jackson (1841) 8 M. & W. 298.

245. An offer to pay a debt upon condition of the creditor giving a receipt, is not a good tender; but a mere request for a receipt is not a condition. *Conditional tender*

Jones v. Arthur (1840) 8 Dowl. 442.

Richardson v. Jackson (1841) 8 M. & W. 298.

[A person refusing to give a receipt duly stamped, upon payment of a debt amounting to two pounds or upwards, is liable to a fine of ten pounds. (Stamp Act, 1891, s. 103.)]

246. A debtor cannot, in the absence of agreement, apply a set-off in reduction of his debt, and tender the residue; but he may avail himself of such set-off by way of plea or counter-claim in an action by the creditor. *Set-off*

Searles v. Sadgrave (1855) 5 E. & B. 639.

Phillpotts v. Clifton (1861) 10 W. R. 135.

247. When action is brought in England to recover a sum of money expressed to be payable in a foreign currency, the amount recoverable is an equivalent sum in English currency, calculated according to the rate of exchange at the date when payment fell due, *Foreign currency*

or, in the case of an action upon a foreign judgment, at the date of the judgment sued upon.

Scott v. Bevan (1831) 2 B. & Ad. 78.

Manners v. Pearson [1898] 1 Ch. 581.

*Alternative
performances*

248. If one of two alternative performances is due, the person who is to perform has the right (in the absence of agreement to the contrary), to elect either alternative. Election, once made, is irrevocable.

Co Litt., 146 a.

Layton v. Pearce (1778) 1 Dougl. 15.

Brocen v. Royal Ins. Co. (1859) 1 E. & E. 853.

*Performance
by agent*

249. Unless a contrary intention appears from the language of the parties, or the nature of the transaction, a debtor may perform his part by a servant or agent. Such a contrary intention is presumed, in the case of any duty involving personal confidence between the parties, or the exercise of the debtor's personal skill.

British Waggon Co. v. Lea (1880) 5 Q. B. D. 149.

*Liability of
representa-
tives*

250. Subject to the provisions of § 249, the duty of performance devolves upon the representatives of a deceased debtor. Any defences available to the debtor are equally available to the debtor's representatives.

Pinchon's Case (1612) 9 Rep. 86 b.
Wills v. Murray (1850) 4 Exch., at p. 865.
Finlay v. Chirney (1888) 20 Q. B. D. 494.

251. Unless a contrary intention appears from the language of the parties, or the nature of the transaction, the right to claim performance devolves upon the representatives of a deceased creditor. Such a contrary intention is presumed in the case of any duty involving personal confidence between the parties.

*Enforcement
by repre-
sentatives*

Wills v. Murray, ubi sup.

252. If the place of performance is fixed by the contract, performance must be rendered at that place.

*Place of
performance*

Sheppard, *Touchstone*, p. 136.

253. If no place of performance is fixed by the contract, the debtor is bound (subject to the provisions of § 254) to find the creditor, and make or tender him performance, provided the creditor is within the jurisdiction. If the creditor, by being outside the jurisdiction, prevents performance being duly made or tendered, the debtor is excused.

*Creditor's
abode*

Sheppard, *Touchstone*, pp. 136, 378. Co. Litt. 210 b.
Haldane v. Johnson (1853) 8 Exch., at p. 695.
Fessard v. Mugnier (1865) 18 C. B. N. S. 286.

*Delivery
of goods*

254. Under a contract to deliver goods without any place being expressly or by implication appointed for delivery, the promisor may require the promisee to appoint a proper place and mode of delivery, and will be discharged if he delivers accordingly.

Co. Litt. 210 b; Sheppard, *Touchstone*, p. 379.
Perkins, *Profitable Book*, s. 785.

[If delivery is to be made in pursuance of a contract of sale, the provisions of the Sale of Goods Act, 1893, s. 29 (1) apply. (See Part II of this Book.)]

*Time of
performance*

255. When a time is fixed, at or within which performance is to take place, performance or tender must take place at or within the time agreed.

Poole v. Tunbridge (1837) 2 M. & W. 223.
Sheppard, *Touchstone*, p. 378.

[As to the effect of non-performance at or within the time agreed, see Book I §§ 115, 116.]

*Reasonable
time*

256. When no time is fixed for performance, performance must take place within a reasonable time, reference being had to the nature of the contract and the circumstances of the case. What is a reasonable time is a question of fact in each case.

Hick v. Raymond [1893] A. C. 22.
Carlton Co. v. Castle Matl Co. [1898] A. C. 486.
Sale of Goods Act, 1893, s. 29 (2).

257. Demand or tender of delivery of goods must be made at a reasonable hour. What is a reasonable hour is a question of fact in each case. *Demand or tender of goods*

Startup v. Macdonald (1843) 6 M. & G. 593.
Sale of Goods Act, 1893, s. 29 (4).

258. When time is of the essence of the contract (Book I, § 115), an extension of the time of performance by request or agreement only substitutes, in the absence of expression to the contrary, the extended time for the time originally fixed, without further waiving the condition. *Extension of time*

Barclay v. Messenger (1874) 43 L. J. Ch. 449.

259. When a debtor, owing several distinct debts to one person, makes him a payment, either with express intimation or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly. *Appropriation of payment by debtor*

Clayton's Case (1816) 1 Mer. 572.
Simson v. Ingham (1823) 2 B. & C., at p. 72.
Nash v. Hodgson (1855) 6 De G. M. & G., at p. 487.

260. When the debtor has omitted to indicate, and there are no other circumstances indicating, to which debt the payment is to be applied, the creditor may, at any time before action brought, apply it *Appropriation of payment by creditor*

at his option to any lawful debt actually due and payable to him from the debtor, even though barred by the law relating to the limitation of actions, or otherwise unenforceable.

Clayton's Case (1816) 1 Mer. 572.

The Mecca [1897] A. C. 286.

Wright v. Laing (1824) 3 B. & C. 165.

Mills v. Fowkes (1839) 5 Bing. N. C. 455.

Mayfield v. Wadsley (1824) 3 B. & C. 362 (per Abbot C. J.)

Philpott v. Jones (1834) 2 A. & E. 41.

Unappropriated payments

261. When neither party makes any appropriation, the payment is applied by law in discharge of the debts in order of date. If the debts are of even date, the payment is applied in discharge of each proportionately.

Clayton's Case, *ubi sup.*

Fawcett v. Bennett (1809) 11 East, 36.

[*Quære* whether, in such a case, the payment is ever applied by law in discharge of statute-barred debts, or debts otherwise unenforceable. (See *Mills v. Fowkes*, *ubi sup.*)]

Account current

262. Where there is a single account current between the parties, or separate accounts treated as one entire account, payments not otherwise appropriated at the time are presumed, in the absence of evidence to the contrary, to be made in discharge of the earlier items of the account.

Clayton's Case (1816) 1 Mer., at p. 608.

Field v. Carr (1828) 5 Bing., at p. 15.

City Discount v. McLean (1874) L. R. 9 C. P. 692.

The Mecca [1897] A. C. 286.

263. The duty of performance may be made conditional upon an antecedent request or demand; but, unless a contrary intention appears from the language of the parties or the nature of the contract, no request or demand of performance is necessary, and action may be brought immediately that performance falls due. *Request for performance*

Birks v. Trippett (1666) 1 Wms. Saund. 33.
Walton v. Mascall (1844) 13 M. & W., at p. 458.
Norton v. Ellam (1837) 2 M. & W. 464.

264. When the duty of performance is conditional upon the happening of some event, the debtor is not entitled to notice of the event unless either (a) he has stipulated for notice; or (b) the event lies within the peculiar knowledge of the creditor. *Conditional performances*

Vyse v. Wakefield (1840) 6 M. & W., at p. 452.
Makin v. Watkinson (1871) L. R. 6 Ex. 25.

265. Unless the law specially provides otherwise, or there is an express or implied agreement for interest in the contract, a debtor is not liable to pay simple or compound interest on his debt (a). A contract to pay simple (b) or compound (c) interest may be inferred from the course of dealing between the parties, or from the custom or usage of a trade or business. *Interest*

- (a) *de Bernaldes v. Fuller* (1810) 2 Campb. 426.
Page v. Newman (1829) 9 B. & C. 378.
- (b) *Calton v. Bragg* (1812) 15 East, 223.
Brue v. Hurter (1813) 3 Campb. 467.
Eaton v. Bell (1821) 5 B. & Ald. 34.
- (c) *Moore v. Voughton* (1816) 1 Stark. 487.
Fergusson v. Fyffe (1841) 8 Cl & F., at p. 140.

[See Addendum at the end of this Title.]

*Accrues from
day to day*

266. Interest under a contract is deemed to accrue from day to day, though agreed to be paid at fixed intervals, and is apportionable between persons successively entitled to the principal fund.

Banner v. Locke (1806) 13 Ves. 135.
Ex p. Smyth (1818) 1 Swanst. 349.
Apportionment Act, 1870, s. 2.

*Separable
from
principal*

267. Interest under a contract may be recovered by action, with or without the principal debt ^(a). When the claim for the principal debt is barred, the claim for interest is barred with it ^(b).

- (a) *Hudson v. Fawcett* (1844) 7 M. & G. 348.
Nordenstrom v. Pitt (1845) 13 M. & W. 723.
- (b) *Hollis v. Palmer* (1836) 2 Bing. N. C., at p. 717.

Rate

268. The parties to a contract may agree upon any rate of interest which they think proper; but, in the case of loans by money-lenders, the provisions of the Money-lenders Act, 1900, apply.

Usury Laws Repeal Act, 1854.

269. When an action is brought to recover an as- *Interest as*
 certain sum, the jury, or the court when acting as *damages*
 a jury, may at discretion allow interest as damages at
 a rate not exceeding the current rate of interest: —

- (a) if the debt is payable by virtue of a written
 instrument at a certain time, from such
 time;
- (b) if the debt is payable otherwise, from the
 time when demand of payment shall have
 been made in writing.

Such demand must give notice to the debtor that
 interest will be claimed from the date of demand
 until the time of payment.

Re State Fire Insce. Co. (1864) 2 H. & M. 722.

Ex parte Lintott (1867) L. R. 4 Eq. 188.

Civil Procedure Act, 1833, s. 28.

Re Lloyd Edwards (1892) 61 L. J. Ch. 22.

270. Every judgment carries interest at the rate of *Interest on*
 four pounds per centum per annum from the time *judgments*
 of entering up the judgment until the same is satis-
 fied; and such interest may be levied under a writ
 of execution on such judgment.

Judgments Act, 1838, s. 17.

R. S. C., 1875, O. XLII. r. 16.

[This § does not apply to County Court judgments, unless and
 until they are removed into the High Court. (*Reg. v. Essex C. C.*
 (1887) 18 Q. B. D. 704).]

ADDENDUM TO TITLE I.

The following cases in which the law allows interest may be noted.

1. *Bills of Exchange and Promissory Notes.* By the Law Merchant and by statute (Bills of Exchange Act, 1882, s. 57 (1)) these carry interest without express agreement. In the absence of express agreement for interest, interest runs only "from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case" (Bills of Exchange Act, 1882, s. 57 (1) (b)). But "where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof" (ibid. s. 9 (3)). In this case, the agreed interest is recoverable until the maturity of the bill or note, as part of the debt, and not as damages (*Florence v. Jennings* (1857) 2 C. B. N. S. 454). After maturity, interest is in each case recoverable as damages only. "Such interest may, if justice require it, be withheld wholly or in part; and, where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper" (Bills of Exchange Act, 1882, s. 57 (3)) ("Bill" includes "note" (s. 89)). The rate, if any, expressed in the instrument is presumptively the measure of damages (*Keene v. Keene* (1857) 3 C. B. N. S. 144).

2. *Contracts to pay a debt by bill or note.* Interest is recoverable in the same manner as if the bill or note had been duly given (*Lowndes v. Collens* (1810) 17 Ves. 27) *Sutton v. Morgan* (1814) 5 Taunt. 758.

3. A sum due on an *account stated* in respect of money lent carries interest from the date of the statement (*Blaney v. Hendricks* (1771) 2 W. Bl. 761. But see the remarks of Lord Ellenborough, C. J., in *Calton v. Bragg* (1812) 15 East, 223).

4. A *surety* who, owing to the default of his principal, is compelled to pay a sum of money, is entitled to recover from the principal interest on the sum so paid, from the date of payment (*Petre v. Duncombe* (1851) 20 L. J. Q. B. 242).

5. A *bond* with a penalty conditioned for the payment of money carries interest, in the absence of provision to the contrary, from the time of the obligor's default (4 & 5 Anne c. 16, s. 13). A single bond does not carry interest (*Hogan v. Page* (1798) 1 B. & P. 337).

6. *Contracts for sale of land.* Interest is payable upon the purchase-money from the time fixed for completion of the purchase, or from the time of the vendor making a good title, whichever is the latest, unless the purchaser is entitled to take possession before completion, when he will be liable to pay interest from that time (*Esdaile v. Stephenson* (1822) 1 Sim. & S. 122, followed in *Jones v. Mudd* (1827) 4 Russ. 118), provided that a good title has then been made. Interest is also payable upon the lien for the return of a deposit or of purchase-money which arises upon a rescission of the contract of sale (*Whitbread v. Watt* [1901] 1 Ch. 911, affirmed [1902] 1 Ch. 835), and on the vendor's lien for unpaid purchase-money (*Re Stucley* (1905) XXII T. L. R. 33).

The mercantile rate of interest is usually 5 per cent; the equitable rate varies from 3 to 5 per cent, according to the circumstances. (See *Re Barclay* [1899] 1 Ch. 674.)

TITLE II—CONSEQUENCES OF NON-PERFORMANCE

Breach of contract

271. When a party to a contract, from whom performance is due, without lawful excuse fails to perform his promise, the contract is broken.

Anticipatory breach

272. When a party to a contract from whom performance is not yet due, absolutely and unequivocally (a) expresses an intention not to perform, (b) disables himself from performing, his promise, the other party may at his option treat the contract as broken; and the contract is thereupon determined.

(a) *Hochster v. Delatour* (1853) 2 E. & B. 678.

Frost v. Knight (1872) L. R. 7 Ex. 114.

Johnstone v. Milling (1886) 16 Q. B. D. (C. A.) 460.

(b) *Lovelock v. Franklyn* (1846) 8 Q. B. 371

Synge v. Synge [1894] 1 Q. B. 466.

Mersey Steel & Iron Co v. Naylor (1884) L. R. 9 App. Ca. 434.

[But (*semble*) if a party temporarily disables himself from performing an act due at a fixed future date, there is no breach. (*Lovelock v. Franklyn*, *ubi sup.*, per Lord Denman, C. J., at p. 378.)]

Damages

273. Every breach of contract gives rise to an action for damages; but, in the case of a breach of promise to pay a fixed sum of money, no damages

are recoverable other than the sum itself, and interest if any.

Marzetti v. Williams (1830) 1 B. & Ad. 415.

Godefroy v. Jay (1831) 7 Bing. 413.

Wallis v. Smith (1882) 21 Ch. D. 243, *per* Jessel, M. R.

274. When a contract is broken, the injured party is entitled, subject to the provisions of § 276, to receive such a sum of money by way of damages as will, so far as possible, put him in the same position as if the contract had been performed. *Measure of damages*

Robinson v. Harman (1848) 1 Ex. 855.

Lock v. Furze (1866) L. R. 1 C. P., at p. 451.

[Contracts for the sale and purchase of real estate which go off because the vendor fails to make a title, are an exception. The purchaser may, in the absence of agreement to the contrary, recover the amount of the deposit he has paid, together with interest, and the expenses of investigating the title, if any; he cannot obtain compensation in damages for the loss of his bargain.

Flureau v. Thornhill (1776) 2 W. Bl. 1078.

Lock v. Furze, *ubi sup.*

Ramsden v. Dyson (1866) L. R. 1 H. L. 129.

Bain v. Fothergill (1874) L. R. 7 H. L. 158.

The reason is the notorious uncertainty of titles to real estate. (See Lord Hatherley's judgment in the last named case.)]

275. When the breach is of the kind described in § 272, and action is brought before performance is due, the plaintiff is entitled to such damages as would have arisen from the non-performance of the contract at the appointed time. In calculating such damages, regard must be paid to any circumstances *Anticipatory damages*

which may have afforded him the means of mitigating his loss. (See § 282)

Frost v. Knight (1872) L. R. 7 Ex. 111.
Michael v. Hart [1902] 1 K. B. 482.

The remoteness of damage

276. Damages are not recoverable in respect of loss following breach of contract, unless the loss was (a) the natural and direct consequence of the breach, or (b) within the contemplation of both parties at the time of making the contract as the probable result of a breach.

Hadley v. Baxendale (1854) 9 Exch. 341.
Gee v. Lanes. & York. Ry. Co. (1860) 6 H. & N., at p. 220.
Simpson v. L. & N. W. Ry. Co. (1876) 1 Q. B. D. 274.
Lepia v. Rogers [1893] 1 Q. B. 31.
Agius v. G. W. Colliery Co. [1899] 1 Q. B. 312.

The decision of this question is matter of law.

Hobbs v. L. & S. W. Ry. Co. (1875) L. R. 10 Q. B., at p. 122.

[Where the bailee of an article deals with it in a manner inconsistent with the terms of the bailment, and damage follows, such damage is deemed to be the natural and direct consequence of the breach of contract. (*Lilley v. Doubleday* (1881) 7 Q. B. D. 510.)]

Mental distress

277. Damages are not recoverable in respect of disappointment of mind or injured feelings, except in the case of a breach of contract to marry.

Hamlin v. G. N. Ry. Co. (1856) 1 H. & N. 408.
Hobbs v. L. & S. W. Ry. Co., *ubi sup.*, at p. 122.
Smith v. Woodfine (1857) 1 C. B. N. S. 669.
Frost v. Knight (1872) L. R. 7 Ex. 111.

278. Personal trouble and inconvenience to the plaintiff may be taken into account in assessing damages. *Inconvenience*

Hobbs v. L. & S. W. Ry. Co., ubi sup.

Phillips v. L. & S. W. Ry. Co. (1879) 5 C. P. D. 280.

279. Damages may be claimed for the probable prospective consequences of a breach of contract, as well as for loss in fact accrued at the time of action; but not in respect of anticipated future breaches. *Prospective damages*

Richardson v. Mellish (1824) 2 Bing. 229.

Lloyd v. Dimminack (1877) 7 Ch. D. 398.

280. When damages have been assessed in an action, further compensation cannot be claimed for subsequent loss arising from the same breach. *Subsequent loss*

Gibbs v. Cruickshank (1873) L. R. 8 C. P. 454.

Phillips v. L. & S. W. Ry. Co. (1879) 5 Q. B. D., at p. 87.

281. When a party to a contract is in default, the injured party may in any reasonable manner make good the breach, and recover as part of his damages the expenses reasonably incurred in doing so. *Making good breach*

Hamlin v. G. N. Ry. Co. (1856) 1 H. & N. 408.

Prehn v. Royal Bank of Liverpool (1870) L. R. 5 Ex. 92.

Le Blanche v. L. & N. W. Ry. Co. (1876) 1 C. P. D., at p. 31.

Ex parte Bank of Brazil [1893] 2 Ch. 438.

*Mitigating
loss*

282. A party to a contract is bound to take all reasonable means of mitigating the loss consequent upon a breach by the other party. If he neglects to do so, he cannot recover any part of the damages which he might have avoided by taking such means.

Frost v. Knight (1872) L. R. 7 Ex., at p. 115.

Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D., at p. 25.

*Mitigation
of damages*

283. In an action for damages for breach of contract, the defendant may prove in mitigation of damages any breaches on the part of plaintiff existing at the time of action brought.

Street v. Blay (1831) 2 B. & Ad. 456.

Allen v. Cameron (1833) 1 Cr. & M. 840.

Oldershaw v. Holt (1840) 12 A. & E. 590.

Mondel v. Steel (1841) 8 M. & W. 858.

Sale of Goods Act, 1893, s. 53.

Bartlett v. Holmes (1853) 13 C. B., at p. 638.

*Nominal
damages*

284. In an action for breach of contract, if the plaintiff proves the breach, but fails to prove any appreciable damage in fact, he will be entitled only to nominal damages. In such a case, the Court will sometimes order the plaintiff to pay the defendant's costs.

Marzetti v. Williams (1830) 1 B. & Ad. 415.

Harris v. Petherick (1879) 4 Q. B. D. 611.

*Court and
jury*

285. When a case is tried by a judge and jury, damages are assessed by the jury, subject to the direction of the Court in matters of law.

Gibbs v. Fremont (1853) 9 Exch., at p. 32.

Hobbs v. L. & S. W. Ry. Co. (1875) L. R. 10 Q. B., at p. 122.

286. A breach of contract may entitle the injured party to obtain from the Court a decree for specific performance; but this remedy will only be granted in cases in which damages would not be sufficient compensation.

Nutbrown v. Thornton (1804) 10 Ves. 161.

Ryan v. Mutual Tontine Association [1893] 1 Ch. (C. A.) at p. 126.

287. Contracts to create or transfer interests in land, and marriage articles, are specifically enforceable, provided that they satisfy the requirements of §§ 220-221.

Adderley v. Dixon (1824) 1 S. & S. 607.

Caton v. Caton (1867) L. R. 2 H. L. 127.

288. The Court will not, in the absence of special circumstances, decree specific performance of a contract relating to movables; but in any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods upon payment of damages.

Buxton v. Lister (1746) 3 Atk. 383.

Adderley v. Dixon, *ubi sup.*

Sale of Goods Act, 1893, s. 52.

*Discretion
of Court*

289. It lies in the judicial discretion of the Court to grant or refuse the remedy of specific performance ;

Ryan v. Mutual Tontine Association [1893] 1 Ch. (C. A.), at p. 126.

and, in particular, specific performance may be refused on the ground of:

- (a) Mistake, involving substantial hardship to the defendant ;

Maner v. Back (1848) 6 Ha., at p. 449.

Wood v. Scarth (1855) 2 K. & J. 33.

Tamplin v. James (1880) 15 Ch. D. 216.

Preston v. Luck (1884) 27 Ch. D., at p. 506.

Stewart v. Kennedy (1890) L. R. 15 App. Ca. 108.

- (b) Fraud ;

Higgins v. Samels (1862) 2 J. & H. 460.

Mullens v. Miller (1882) 22 Ch. D. 194.

- (c) Misrepresentation ;

Lamare v. Dixon (1873) L. R. 6 H. L. 414.

Redgrave v. Hurd (1881) 20 Ch. D. 1.

- (d) Concealment of facts which it was the duty of the plaintiff to disclose ;

Shirley v. Stratton (1785) 1 Bro. Ch. 440.

Fothergill v. Phillips (1871) L. R. 6 Ch. App. 770.

- (e) Delay or failure by the plaintiff in performing his part, or delay in claiming relief ;

Milward v. Earl of Thanet (1801) 5 Ves. 720 n.

Clarke v. Hart (1858) 6 H. L. C., at pp. 635-6.

Mills v. Haywood (1877) 6 Ch. D. 196.

Howe v. Smith (1884) 27 Ch. D., at p. 92.

Cornwall v. Henson [1900] 2 Ch. (C. A.) 298.

- (f) Any other circumstances rendering it inequitable or improper to grant this relief.

Buxton v. Lister (1746) 3 Atk., at p. 386.

Webster v. Cecil (1861) 30 Beav. 62.

Hope v. Walter [1900] 1 Ch. 257.

290. The Court will not decree specific performance of a contract for personal service, or of any contract which it would be impracticable or inexpedient for the Court to enforce specifically. *Contracts for personal service*

Rayner v. Stone (1762) 2 Eden, 128.

Moseley v. Virgin (1796) 3 Ves. 184.

Wolverhampton Ry. Co. v. L. & N. W. Ry. Co. (1873) L. R. 16 Eq. 439.

Rigby v. Connol (1880) 14 Ch. D., at p. 487, per Jessel, M. R.

Baird v. Wells (1890) 44 Ch. D. 661.

[As a general rule, contracts to build fall within this clause; but where a person has contracted to build on a piece of land according to certain detailed plans, and has obtained a conveyance or lease of the land on the terms that he will do so, a decree of specific performance will be granted, if the remedy in damages would not be adequate. (*Wolverhampton Corpn. v. Emmons* [1901] 1 Q. B. 515; *Molyneux v. Richard* [1905] W. N. 164.)

And the same rule applies where a railway company has acquired land in consideration of undertaking to execute specific works upon it (*Ferrey v. G. W. Ry. Co.* [1894] 3 Ch. 625, n.)]

291. The Court will not specifically enforce gratuitous promises, though under seal, nor contracts determinable at the will of either party. *Gratuitous contracts*

In re Lucan (1890) 45 Ch. D. 470.

Hercy v. Birch (1804) 9 Ves. 357.

Infants

292. An infant cannot obtain a decree of specific performance of a contract entered into by him.

Flight v. Bolland (1828) 4 Russ. 298.

[This is because the infant cannot himself be made to perform his contracts.]

Injunction

293. When the parties contract (expressly or by implication) that a certain thing shall not be done, breach of such a contract may be prohibited by injunction, although the contract itself is not capable of being specifically enforced.

Lumley v. Wagner (1852) 1 De G. M. & G. 604.

Whitwood Chemical Co. v. Hardman [1891] 2 Ch. (C. A.) 416.

Holford v. Acton Urban District Council [1898] 2 Ch. 240.

[A contract in form positive may, if it is in effect negative, be enforced by the remedy of injunction, unless, perhaps, it is a contract of personal service. (*Catt v. Tourle* (1869) L. R. 4 Ch. App. 654; *Whitwood Chemical Co. v. Hardman*, *ubi sup.*)]

TITLE III—IMPOSSIBILITY OF PERFORMANCE

294. A contract is void if the performance of it is either contrary to the course of nature or, by reason of facts known to both parties, impossible in law. *Impossibility in nature or law*

Clifford v. Watts (1871) L. R. 5 C. P., at p. 588.

Harvey v. Gibbons (1675) 2 Lev. 161.

[Apparently, when the facts causing the impossibility in law are known to one party only, that party cannot sue upon the contract; but the other party can sue. (*Wild v. Harris* (1849) 7 C. B. 999; *Millward v. Littlewood* (1850) 20 L. J. Ex. 2.)]

295. Impossibility arising from law other than English law, counts as impossibility of fact. *Foreign law*

Barker v. Hodgson (1814) 3 M. & S. 267.

Jacobs v. Credit Lyonnais (1884) 12 Q. B. D. 589.

296. A contract, performance of which is, at the time of concluding it, impossible in fact, is not void; unless the parties contracted conditionally upon performance being possible in fact. But (probably) no action can be brought upon it by a party who, at the time of concluding it, knew of the impossibility. *Impossibility in fact*

Marquis of Bute v. Thompson (1844) 13 M. & W. 487.

Hills v. Sugbrue (1846) 15 M. & W. 233.

Clifford v. Watts (1871) L. R. 5 C. P. 577.

Sale of Goods Act, 1893 s. 6.

Cunningham v. Dunn (1878) 3 C. P. D. 443.

*Supervening
impossibility*

297. A contract for a performance which, at the time of concluding the contract, is possible in law and in fact, but which afterwards becomes impossible without default of either party, remains valid ;

Paradine v. Jane (1647) Aleyn 26.

Brown v. Royal Insurance Co. (1859) 1 E. & E., at p. 859.

Arthur v. Wynne (1880) 14 Ch. D. 603.

Nickoll v. Ashton, Edridge and Co. [1901] 2 K. B. (C. A.) 126.

Krell v. Henry [1903] 2 K. B. (C. A.), at p. 748.

unless:—

- (a) the subsequent impossibility is due to an alteration in the law ;

Baily v. de Crespigny (1869) L. R. 4 Q. B. 180.

- (b) the parties intended that in the event of impossibility of performance the contract should cease to be binding.

Such an intention is presumed :

- (1) when the possibility of performance was known by the parties to depend upon the continued existence of some thing, condition, or state of things, which has ceased to exist ;

Taylor v. Caldwell (1863) 3 B. & S. 826.

Appleby v. Myers (1867) L. R. 2 C. P. 651.

Boast v. Firth (1868) L. R. 4 C. P. 1.

Krell v. Henry, *ubi sup.*

Sale of Goods Act, 1893, s. 7.

- (2) when the agreement relates to personal services to be rendered by one of the parties, and performance becomes impossible by reason of the death or illness of that party.

Farrow v. Wilson (1869) L. R. 4 C. P. 744.

Robinson v. Davison (1871) L. R. 6 Ex. 269.

[In the event of illness, the party disabled must give to the other party the earliest notice of the disablement that is reasonably practical. If he omits to do so, the other party is entitled to recover such damages as are directly referable to the omission. *Robinson v. Davison*, *ubi sup.*.)]

298. When either of two alternatives is to be performed at the promisor's option, and one of them is at the time of concluding the contract impossible in law or in fact, the promisor is bound to perform the one which is possible. *One alternative impossible at making*

Da Costa v. Davis (1798) 1 B. & P. 242.

Stevens v. Webb (1835) 7 C. & P., at p. 62.

299. When either of two alternatives is to be performed at the promisor's option, and one of them becomes impossible after the conclusion of the contract, but before the option has been exercised, it is a question of construction in each case whether, according to the true intention of the parties, the promisor must perform the alternative which remains possible, or is altogether discharged. *One alternative becoming impossible*

Barkworth v. Young (1856) 4 Drew., at p. 25.

300. When either of two alternatives is to be performed at the promisor's or the promisee's option, and the promisor or the promisee chooses an alternative which afterwards becomes impossible, the promisor is in the same position as if he had originally *Choice impossible*

contracted to do the act, which he or the promisee has elected.

Brown v. Royal Insurance Co. (1859) 1 E. & E. 853.

*Partial
impossibility*

301. When the performance of a contract is or becomes in part possible and in part impossible, it is a question of intention, depending on usage and construction in each case, whether the partial impossibility avoids or discharges the contract, and whether performance by one party of the possible part entitles him or his representatives to claim any and if any how much counter-performance from the other.

Menetone v. Athawes (1764) 3 Burr. 1592.

Cutter v. Powell (1795) 6 T. R. 320.

Gillett v. Maceman (1808) 1 Taunt. 140.

Appleby v. Myres (1867) L. R. 2 C. P. 651.

Geipel v. Smith (1872) L. R. 7 Q. B. 404.

The Teutonia (1872) L. R. 4 P. C. 171.

*Rights
previously
acquired*

302. The dissolution of a contract by subsequent impossibility does not affect any specific right already acquired under it by either of the parties.

Taylor v. Caldwell (1863) 3 B. & S. 826.

Whincup v. Hughes (1871) L. R. 6 C. P. 78.

Anglo-Egyptian Co. v. Rennie (1875) L. R. 10 C. P. 271.

Krell v. Henry [1903] 2 K. B. 740.

Chandler v. Webster [1904] 1 K. B. (C. A.) 493.

[In *Elliott v. Crutchley* [1904] 1 K. B. 565 (subsequently affirmed by the H. of Lords), there was an express stipulation, which took the case out of the general rule.]

*Inability to
perform*

303. In the absence of agreement express or implied to the contrary, mere inability to perform a

promise is not impossibility within the meaning of this Title.

Thornborow v. Whitacre (1706) 2 Lord Raym. 1164, per Holt, C. J.

[For the effect of impossibility in relation to a condition of a bond, see Book I § 114.]

TITLE IV—RECIPROCAL PROMISES

*Independent
promises*

304. When a contract consists of reciprocal promises, and the promise of either party is, according to the true construction of the contract, a mere independent agreement (Book I § 111), the other party is entitled to performance, whether he has himself performed his own promise or not.

Ware v. Chappell (1649) Stile, 186.

Kingston v. Preston (1773) (per Lord Mansfield, C. J.), cited in *Jones v. Barkley* (1781) 2 Dougl., at p. 689.

*Conditional
promises*

305. When a contract consists of reciprocal promises, and performance or some performance by one party is a condition precedent of performance by the other, the first named party is not entitled to performance by the other unless he has himself performed or tendered performance of his duty under the contract, or unless performance has been prevented or refused by the other party.

Pordage v. Cole (1669) 1 Wms. Saund. 319.

Peeters v. Opie (1672) 2 Wms. Saund. 350.

Hotbam v. East India Co. (1787) 1 T. R. 638.

Morton v. Lamb (1797) 7 T. R. 125.

Stavers v. Curling (1836) 3 Scott, 740.

Roberts v. Brett (1856) 18 C. B. 561.

Christie v. Borelly (1860) 7 C. B. N. S. 561.

The order in which such promises are to be performed is determined by the Court, in view

of the language of the parties and the nature of the transaction.

Kingston v. Preston (1773), cited in *Jones v. Barkley* (1781) 2 Dougl., at p. 689.

Graves v. Legg (1854) 9 Exch., at p. 716; (1857) 2 H. & N. 210.

Roberts v. Brett (1856) 18 C. B. 561.

306. When, in a contract falling within § 305, several acts or forbearances are promised on either or both sides, it is a question of construction for the Court whether part performance by one party entitles him to a corresponding part performance or to entire performance by the other, or whether complete performance on one side is a condition precedent of any performance on the other. *Part performance of conditions*

Neale v. Ratcliff (1850) 15 Q. B. 916.

Wilson v. London Navigation Co. (1865) L. R. 1 C. P. 61.

307. In a contract falling within § 305, a party who has, by accepting substantial part performance, waived the breach of a condition, cannot insist upon complete performance as a condition precedent of performance by himself; but he may claim compensation in respect of the non-performance. *Waiver of condition*

White v. Beeton (1861) 7 H. & N., at p. 50.

Behn v. Burness (1863) 3 B. & S. 751.

Pust v. Dozwie (1865) 5 B. & S. 37.

Sale of Goods Act, 1893, s. 11, subs. 1 (c).

TITLE V—EARNEST AND PENALTIES

Earnest

308. If, upon the making of a contract, something is given as earnest, this is evidence of the conclusion of the contract. It may also serve as a security that the contract shall be performed.

Langfort v. Tiler's Admix. (1704) 1 Salk. 113.
Ex parte Barrell (1875) L. R. 10 Ch. App., at p. 514.

*Character
of earnest*

309. In the absence of agreement to the contrary, earnest is :

- (a) to be returned or treated as part payment upon performance ;
- (b) to be forfeited, if the party giving it fails to perform ;
- (c) to be returned, if the party receiving it fails to perform.

Howe v. Smith (1884) 27 Ch. D. (C. A.), at pp. 101-102.

*Deposit on
purchase*

310. In the absence of expression to the contrary, a deposit by a purchaser on a sale counts as earnest.

Soper v. Arnold (1889) L. R. 14 App. Ca., at p. 435.
Lerry v. Stogdon [1898] 1 Ch. 478.

*Earnest as
damages*

311. If a person who has received earnest money from another claims damages from that other for

breach of contract, the earnest is, in the absence of agreement to the contrary, to be taken into account in estimating the damages due to the claimant.

Howe v. Smith (1884) 27 Ch. D., at p. 105.

312. When the parties to a contract agree that a certain sum is to be paid in the event of breach by the party in default, the Court must decide, with reference to the intention of the parties to be gathered from the whole of the contract, whether the sum so agreed to be paid is to be regarded as a penalty or as liquidated damages (Book I § 117). *Penalty or liquidated damages*

Davies v. Penton (1827) 6 B. & C. 216.

Sainter v. Ferguson (1849) 7 C. B. 619.

Law v. Redditch Local Board [1892] 1 Q. B., at p. 132.

313. If in the view of the Court the sum in question is a penalty, the injured party cannot recover more than the amount of the loss actually suffered by him. *Penalty not recoverable*

Kemble v. Farren (1829) 6 Bing. 147.

314. If in the view of the Court the sum in question is liquidated damages, the injured party may recover such sum in full. *Liquidated damages recoverable*

Kemble v. Farren, ubi sup.

*Language
immaterial*

315. If the sum in question is in truth a penalty, it is immaterial that the parties have expressed it to be payable as liquidated damages; and if the sum in question is in truth liquidated damages, it is immaterial that the parties have expressed it to be a penalty.

Kemble v. Farren, (1829) 6 Bing. 147.

Sainter v. Ferguson (1849) 7 C. B. 619.

Sparrow v. Paris (1862) 7 H. & N. 599.

Parfitt v. Chambre (1872) L. R. 15 Eq. 36.

Clyde Bank Engineering Co. v. Castaneda [1905] A. C. 6.

*Larger sum
on failure to
pay smaller*

316. If a sum of money is agreed to be paid on failure to pay a smaller sum, the former sum is a penalty.

Astley v. Weldon (1801) 2 B. & P. 346.

Wallis v. Smith (1882) 21 Ch. D. 257.

[This principle probably extends to agreements to pay money on failure to perform any obligation for the breach of which damages can be readily assessed; e. g., to supply goods or render services of a kind readily obtainable in the open market. (*Sloman v. Walter* (1784) 1 Bro. C. C. 418; *Law v. Redditch Local Board* [1892] 1 Q. B. (C. A) 127.)]

*Same provi-
sion for
different
breaches*

317. If a contract contains several promises, of which any one is a promise to pay a certain sum of money, and a fixed sum is to be paid for the breach of any of them indifferently, this is a penalty.

Kemble v. Farren (1829) 6 Bing. 147.

318. If the value of the thing or things to be done is not readily ascertainable, and a specified sum is agreed to be paid in the event of breach, this sum may be recovered as liquidated damages. *Provision for promises of uncertain value*

Reynolds v. Bridge (1856) 6 E. & B., at p. 540.

Wallis v. Smith (1882) 21 Ch. D. 257.

Law v. Redditch Local Board [1892] 1 Q. B. 127.

[But if the things to be done under the contract comprise one or more matters of unascertained but trivial importance, and a large sum is to be paid in the event of any breach, *quære* whether this would not be treated by the Court as a penalty. (*Wallis v. Smith, ubi sup.*, at pp. 262-265.)]

319. If the parties have agreed for a penalty or liquidated damages to be paid in the event of breach, this agreement does not preclude the remedy of specific performance or injunction where such remedy is appropriate. But a plaintiff who has actually adopted the one remedy cannot afterwards avail himself of the other. *Provision does not include other remedies*

Howard v. Hopkyns (1742) 2 Atk. 371.

French v. Macale (1842) 2 Dr. & W., at p. 284.

Coles v. Sims (1854) 5 De G. M. & G. 1.

Jones v. Heavens (1877) 4 Ch. D. 636.

Howard v. Woodward (1864) 34 L. J. Ch. 47.

General Accident Assurance v. Noel [1902] 1 K. B. 377.

320. A contract whereby a man agrees to pay a sum of money or to do any other act on failure to do an illegal act (*quære*, or to omit a legal duty) is void. *Penalty inducing illegality*

Collins v. Blantern (1767) 2 Wils. 341.

Walrond v. Walrond (1858) 1 Johns. 18.

*Penalty for
non-performance
of im-
possibility*

321. A contract (not being a bond) to pay a penalty, or to do any other act, in the event of the non-performance of an act contrary to the course of nature or, by reason of facts known to both parties, impossible in law, is a mere voluntary promise (§§ 203, 212, 213). If the contract is expressed in the form of a bond, the provisions of Book I § 114, apply.

Co. Litt. 206 b.

*Bond con-
ditioned for
performance
or non-
performance*

322. Subject to Book I § 114, when a bond is conditioned to be void upon performance or non-performance by the obligor of a certain act or acts, it is construed as a contract by the obligor to perform or not to perform the act or acts, as the case may be.

Logan v. Wienholt (1833) 1 Cl. & F. 611.

SECTION IV

ASSIGNMENT OF CONTRACT

323. Subject to the provisions of §§ 324 and 325, any right arising out of a contract may be assigned. *Contractual rights generally assignable*

Tolhurst v. Associated Cement Manufacturers [1903] A. C., at p. 420.

324. A mere right to sue for unliquidated damages in respect of a breach of contract already committed is (probably) unassignable, except by operation of law. *Assignment of rights to sue for past breaches*

May v. Lane (1894) 64 L. J. Q. B. 236.

Torkington v. Magee [1902] 2 K. B. at p. 433.

[But see *Weinberg v. Ogdens Ltd.* (1905) XXII T. L. R. 58.]

325. The benefit of a contract is not assignable, if the parties intended that the promisee alone should be entitled thereto. Such an intention is presumed, if the nature of the transaction involves personal confidence between the parties, or is otherwise such that personal considerations are of the essence of the contract. *Personal contracts*

Hole v. Bradbury (1879) 12 Ch. D. 886.

Griffith v. Tower Publishing Co. [1897] 1 Ch. 21.

Tolhurst v. Associated Cement Manufacturers [1902] 2 K. B. 660; [1903] A. C. 414.

*Notice to
promisor .*

326. An assignment of a right is not complete as against the debtor until he has notice thereof. If, before notice is communicated to him, he has *bonâ fide* discharged his liability to the assignor, he is not liable to the assignee.

Williams v. Sorrell (1799) 4 Ves. 389.

Stocks v. Dobson (1853) 4 De G. M. & G. 15.

Priorities

327. If there are more assignees than one, they are entitled, as against the debtor, according to priority of notice to him.

Marchant v. Morton, Down, & Co. [1901] 2 K. B. 829.

*Considera-
tion*

328. A debtor may not decline performance to an assignee on the ground that there is no consideration for the assignment as between assignee and assignor.

Walker v. Bradford Old Bank (1884) 12 Q. B. D. 511.

Harding v. Harding (1886) 17 Q. B. D. 442.

Equities

329. The debtor may put forward against the assignee any defences which at the date of the notice were available to him against the assignor.

Mangles v. Dixon (1852) 3 H. L. C. 735.

Graham v. Johnson (1869) L. R. 8 Eq. 36.

Crouch v. Credit Foncier (1873) L. R. 8 Q. B. 380.

Roxburghe v. Cox (1881) 17 Ch. D. 520.

[Such defences may include claims against the assignor which, though not actually enforceable at the date of the notice, arise out of transactions entered into between the assignor and the debtor

before that date. But, to render these claims available as defences, there must either have been an agreement between the assignor and the debtor that mutual credit should be given in respect of such transactions, or the claims must have arisen out of the contract the benefit of which is assigned. (*Watson v. Mid-Wales Ry. Co.* (1867) L. R. 2 C. P. 593; *Christie v. Taunton* [1893] 2 Ch. 175; *Govt. of Newfoundland v. Newfoundland Ry. Co.* (1888) L. R. 13 App. Ca. 199.)]

330. A duty arising out of contract is unassignable. *Contractual duties not assignable*
Liversidge v. Broadbent (1859) 4 H. & N. 603.
Tolhurst v. Associated Cement Manufacturers [1902] 2 K. B. 660.

[The universality of this rule is unaffected by the judgment of the House of Lords in *Tolhurst's* case. Nor is it affected by the provisions of § 249 *supra*.]

331. The provisions of this Section do not apply *Negotiable instruments*
to negotiable instruments.

SECTION V

DISCHARGE OF CONTRACT

*Modes of
discharge*

332. A contract may be discharged in any of the following ways: —

- (a) By performance; (§ 333).
- (b) By agreement; (§§ 334-337).
- (c) By condition subsequent; (§ 338).
- (d) By breach of condition or renunciation;
(§§ 339-343).
- (e) By operation of law; (§§ 344-347).

*Performance
and tender*

333. A contract is discharged by performance when each party has wholly performed his duty under it. Subject to § 239, tender is equivalent to performance.

Startup v. Macdonald (1843) 6 M. & G. 593.

Agreement

334. A contract may be discharged by a subsequent agreement of the parties that it shall no longer bind them, or by the substitution of a new contract.

King v. Gillett (1840) 7 M. & W. 55.

Foster v. Dawber (1851) 6 Exch., at p. 851.

Thornhill v. Neats (1860) 8 C. B. N. S. 831.

Scarf v. Jardine (1882) L. R. 7 App. Ca., at p. 351.

[Although the original contract was a specialty contract, performance of a simple contract, which professes to vary or discharge it, will be an answer to an action on the original contract. (*Nash v. Armstrong* (1861) 10 C. B. N. S. 259; *Steeds v. Steeds* (1889) 22 Q. B. D. 537.) But *quære* whether the second contract is effectual as a discharge without performance?]

335. Contracts falling within §§ 220 and 222 may be discharged by oral agreement; but a substituted agreement which is unenforceable because it fails to comply with the requirements of those §§ does not operate as a discharge of such a contract. *Oral Agreement*

Goman v. Salisbury (1684) 1 Vern. 240.

Goss v. Lord Nugent (1833) 5 B. & Ad. 65.

Harvey v. Grabbam (1836) 5 A. & E., at pp. 73-74.

336. When a contract has been wholly performed on one side, an agreement by the continuing creditor to discharge the debtor from the performance due from him, is ineffectual, unless it is under seal or made for a consideration. *Consideration*

Foster v. Dawber (1851) 6 Exch. 839.

Williams v. Stern (1879) 5 Q. B. D. (C. A.) 409.

337. The discharge of instruments governed by the Bills of Exchange Act 1882, is regulated by ss. 59, 62, 63 of that Act. *Negotiable instruments*

338. If it is an express or implied term in a contract that, in a certain event or after a certain time. *Condition subsequent*

the contract shall be wholly or partly at an end, the contract is wholly or partly discharged accordingly, when such event happens or time has elapsed ("Condition subsequent").

Nowlan v. Ablett (1835) 2 C. M. & R. 54.

Head v. Tattersall (1871) L. R. 7 Ex. 7.

Geipel v. Smith (1872) L. R. 7 Q. B. 404.

Jackson v. Union Marine Insurance Co. (1874) L. R. 10 C. P. 148.

*Existing
rights*

The determination of a contract by a condition subsequent does not affect any right already enforceable under the contract by either party.

Anglo-Egyptian Co. v. Rennie (1875) L. R. 10 C. P. 271.

Chandler v. Webster [1904] 1 K. B. (C. A.) 493.

*Future of
condition*

339. When a contract consists of reciprocal promises, and performance or some performance by one party is a condition precedent of performance by the other (Book I § 110; Book II § 305), if the first named party without lawful excuse (*a*) either fails so to perform or (*b*) absolutely and unequivocally expresses an intention not to perform, or (*c*) disables himself from performing, his promise, the other party may at his option treat the contract as at an end, and the contract is thereupon discharged.

(*a*) *Mersey Steel Co. v. Naylor, Benson and Co.* (1884) L. R. 9 App. Ca., 434.

(*b*) *Freeth v. Burr* (1874) L. R. 9 C. P. 208.

Johnstone v. Milling (1886) 16 Q. B. D. 460.

(*c*) *Lovelock v. Franklyn* (1846) 8 Q. B. 371.

Synge v. Synge [1894] 1 Q. B. 466.

340. Even if performance by one party is not a condition precedent of performance by the other, either party may treat the contract as discharged if the acts and conduct of the other evince an intention to renounce it. *Renunciation*

Fretch v. Burr, ubi sup.

Mersey Steel Co. v. Naylor (1884) L. R. 9 App. Ca., at p. 438.

341. If, in a case falling within §§ 339, 340, the injured party does not treat the contract as discharged, he continues liable to perform his part, and the other party may claim the benefit of any subsequently arising ground of discharge as an excuse for non-performance; but the injured party may claim damages for breach of contract. *Waiver of breach •*

Frost v. Knight (1872) L. R. 7 Ex. 114.

Johnstone v. Milling (1886) 16 Q. B. D. 460.

Avery v. Bowden (1855) 5 E. & B. 714.

Pust v. Dowie (1863) 32 L. J. Q. B. 179.

342. Whether a term in a contract is :

Character of stipulations

- (a) a condition, the fulfilment or non-fulfilment of which will discharge the contract; or
- (b) a promise, the breach of which may at the option of the injured party be treated as having that effect; or
- (c) a promise, the breach of which merely gives rise to a claim for damages (“warranty”),

is a question to be decided by the Court on the construction of the contract.

Glabsim v. Hays (1841) 2 M. & G. 257.

Simpson v. Crippin (1872) L. R. 8 Q. B. 14.

Freeth v. Burr (1874) L. R. 9 C. P. 208.

Bettini v. Gye (1876) 1 Q. B. D. 183.

Mersey Steel & Iron Co. v. Naylor (1884) L. R. 9 App. Ca. 434.

*Delay in
performance*

343. When in a contract a time is fixed for the performance of an act, and such time is not of the essence of the contract (Book I § 115), then, if there is delay in performance on the part of the promisor, the promisee has the right by notice to limit a reasonable time for performance, and, upon failure to perform within that time, to treat the contract as discharged.

What is a reasonable time is a question of fact in each case.

Taylor v. Brocon (1839) 2 Beav. 180.

Parkin v. Thorold (1852) 16 Beav. 59.

Hatten v. Russell (1888) 38 Ch. D. 334.

*Operation
of law*

344. A contract may be discharged by operation of law in any of the following ways:—

- (a) By merger; (§ 345).
- (b) By bankruptcy; (§ 346).
- (c) By alteration of a written instrument. (§ 347).

Merger

345. An obligation arising out of a simple contract is discharged by merger, when an identical

obligation is created between the same parties by specialty.

Higgins' Case (1605) 6 Rep. 45 b.
Holmes v. Bell (1841) 3 M. & G. 213.
Bell v. Banks (1841) 3 M. & G. 258.
Owen v. Homan (1851) 3 Mac. & G. 378.
Price v. Moulton (1851) 20 L. J. C. P. 102.

346. The making of a receiving order in bank- *Bankruptcy*
 ruptcy suspends the creditor's right to sue the debtor
 on a contract, and compels him to resort to the
 method of enforcement provided by the Bankruptcy
 Act, 1883. Except as to claims provided for by
 ss. 30 (subs. 1) and 37 (subs. 6) of that Act, the dis-
 charge of the bankrupt destroys the creditor's right
 of action against him.

Bankruptcy Act, 1883, s. 30 (2).

347. Any material alteration in a written contract *Alteration*
 intentionally made, without the consent of the prom- *in written*
 isor, by the promisee, or by any person while the in- *document*
 strument is in the possession of the promisee, not
 being an alteration made by mistake, discharges the
 promisor.

Pigot's Case (1614) 11 Rep. 27 b.
Wilkinson v. Johnson (1824) 3 B. & C. 428.
Davidson v. Cooper (1844) 13 M. & W. 343.
Aldous v. Cornwell (1868) L. R. 3 Q. B. 573.
Pattinson v. Luckley (1875) L. R. 10 Ex. 330.
Prince v. The Oriental Bank (1878) L. R. 3 App. Ca. 325.
Suffell v. Bank of England (1881) 7 Q. B. D. 270; 9 Q. B. D.
 (C. A.) 555.

[For a modification in the case of negotiable instruments, see Bills of
 Exchange Act, 1882, s. 64.]

SECTION VI

DISCHARGE OF RIGHTS OF ACTION ARISING FROM CONTRACT

*Modes of
discharge*

348. Rights of action arising out of contract may be discharged in any of the following ways:

- (a) By release; (§ 349)
- (b) By accord and satisfaction; (§§ 350, 351)
- (c) By payment in satisfaction; (§ 352)
- (d) By judgment; (§ 353)
- (e) By operation of the Statutes of Limitation.
(§ 354)

Release

349. A document under seal, whereby a party entitled to sue foregoes his claim, discharges his right of action (“Release”).

Barker v. St. Quintin (1844) 12 M. & W., at p. 453.
Harris v. Goodwyn (1841) 2 M. & G. 405.

*Accord and
satisfaction*

350. A party entitled to sue another for breach of contract may agree with the party liable to accept some act in satisfaction of his claim. When such act has been performed, the agreement and per-

formance discharge the right of action ("Accord and Satisfaction").

Bayley v. Homan (1837) 3 Bing. N. C. 920.

Smith v. Trowsdale (1854) 3 E. & B. 83.

Day v. McLea (1889) 22 Q. B. D. (C. A.) 610.

351. Such an agreement not followed by performance does not operate as a discharge; but the making of a new promise may be accepted absolutely or conditionally as a satisfaction, if that was the intention of the parties, and then will absolutely or conditionally discharge the claim; *Accord without satisfaction*

Sard v. Rhodes (1836) 1 M. & W. 153.

Evans v. Powis (1847) 1 Exch. 601.

Henderson v. Stobart (1850) 5 Exch. 99.

Hall v. Flockton (1851) 16 Q. B. 1039.

Gabriel v. Dresser (1855) 15 C. B. 622.

except that a promise by the party liable, not being a negotiable instrument, to pay the whole or a part of a liquidated debt, cannot be so accepted.

Bidder v. Bridges (1887) 37 Ch. D. (C. A.) 406.

Cumber v. Wane (1718) 1 Stra. 426.

McManus v. Bark (1870) L. R. 5 Ex. 65.

Foakes v. Beer (1884) L. R. 9 App. Ca. 605.

352. A right of action on a liquidated claim *Payment* is discharged by payment, or by any act which is in law equivalent to payment ("Payment in Satisfaction").

Asb v. Pouppeville (1867) L. R. 3 Q. B. 86.

Tetley v. Wanless (1867) L. R. 2 Ex. 275 (Ex. Ch.).

*Payment of
lesser sum*

The mere payment in coin of the realm of a lesser sum, in satisfaction of a debt accrued due, only discharges the debt *pro tanto*.

Foakes v. Beer (1884) L. R. 9 App. Ca. 605.

Underwood v. Underwood [1894] P. 204.

Judgment

353. A right of action arising from contract is discharged when judgment is recovered upon it in due course of law.

Owen v. Homan (1853) 3 Mac. & G. 407; 4 H. L. C. 997, 1037.

Kendall v. Hamilton (1879) L. R. 4 App. Ca. 504.

Comrs. of Stamps v. Hope [1891] A. C. 476.

Hammond v. Schofield [1891] 1 Q. B. 453.

McLeod v. Power [1898] 2 Ch. 295.

*Lapse of
time*

354. A right of action arising out of a breach of contract may be discharged by the lapse of time (Bk. I Sect. V).

SECTION VII

CO-DEBTORS AND CO-CREDITORS

355. When two or more persons contract as prom- *Co-promisor*
isors in respect of the same performance, they may
contract as:—

- (a) joint; or
 - (b) several; or
 - (c) joint and several,
- promisors.

356. Persons contract as joint promisors when *Joint*
they unite in making one and the same promise. *promisors*

White v. Tyndall (1888) L. R. 13 App. Ca. 263.

[e. g. “The said A and B do hereby for themselves, their executors administrators and assigns, covenant, promise, and agree.”]

357. Persons contract as several promisors when *Several*
they enter into independent promises for the same *promisors*
performance.

Ward v. National Bank of New Zealand (1883) L. R. 8 App. Ca. 755.

[e. g. “The said A and B, each for himself, his executors etc., do hereby covenant, promise, and agree.”]

*Joint and
several
promisors*

358. Persons contract as joint and several promisors when they unite in making the same promise, and also enter into independent promises for the same performance.

Ex parte Harding (1879) 12 Ch. D. 557.

Burns v. Bryan (1887) L. R. 12 App. Ca. 184.

[e. g. "The said A and B for themselves do hereby covenant, and each of them for himself doth covenant."]

*Liability of
co-promisors*

359. When two or more persons contract as promisors for the same performance (whether as joint promisors, or as several promisors, or as joint and several promisors) each of them is liable for the whole performance promised, unless the contrary appears from the terms of the contract.

Richards v. Heather (1817) 1 B. & Ald., at p. 35.

King v. Hoare (1844) 13 M. & W., at p. 505.

Tyler v. The Shipowners' Syndicate [1896] 1 Q. B. 135.

*Discharge of
co-promisors*

360. If one co-promisor has fully performed the promise, or satisfied judgment thereon, the liability to the creditor of the other co-promisor or co-promisors is discharged.

King v. Hoare (1844) 13 M. & W. 494.

Beaumont v. Greathead (1846) 2 C. B., at p. 500.

Thorne v. Smith (1851) 10 C. B. 659.

*Judgment
against joint
promisor*

361. A judgment recovered against one joint promisor discharges the liability to the creditor of the other or others, even though the judgment

has not been satisfied ; but this rule does not apply to several, nor to joint and several, promisors.

Kendall v. Hamilton (1879) L. R. 4 App. Ca. 504.

362. A valid release of one joint, or joint and several promisor, discharges the liability of the other or others, unless the release expressly reserves the rights of the creditor against the other promisor or promisors. *Release of joint promisor*

North v. Wakefield (1849) 13 Q. B., at p. 541.

Mercantile Bank v. Taylor [1893] A. C. 317.

In re E. W. A. [1901] 2 K. B. 642.

363. When judgment has been obtained against co-promisors, execution may be levied upon any one of them for the whole amount of the judgment debt. *Execution against co-promisors*

Bird v. Randall (1762) 1 Wm. Bl. 388.

Land Credit Co. v. Fermoy (1870) L. R. 5 Ch. App. 323.

364. Except in the case of partners, the liability of one joint promisor survives on his death to the remaining promisor or promisors, and does not pass to his representatives. Upon the death of a last surviving joint promisor, his liability passes to his representatives. *Survival of joint liability*

Hill's Case (1875) L. R. 20 Eq. 585.

Re Hodgson (1885) 31 Ch. D. 177.

White v. Tyndall (1888) L. R. 13 App. Ca. 263.

Contribution

365. If one of joint promisors, or of joint and several promisors, has performed the promise, or suffered and satisfied judgment upon it, he is presumptively entitled to equal contribution from the other surviving co-promisor or co-promisors, and from the representatives of a deceased co-promisor.

Underhill v. Horwood (1804) 10 Ves., at p. 226.

Prior v. Hembrow (1841) 8 M. & W. 889.

Batard v. Hawes (1853) 2 E. & B. 287.

Ellesmere Brewery Co. v. Cooper [1896] 1 Q. B. 75.

Insolvency

366. If one joint, or joint and several, promisor is insolvent, the contribution due from the others is increased proportionately.

Hitchman v. Stewart (1855) 3 Dr. 271.

Lowe v. Dixon (1885) 16 Q. B. D. 455.

Ellesmere Brewery Co. v. Cooper, *ubi sup.*, at p. 80.

[The presumption of any or of equal contribution may be rebutted by circumstances, *e.g.* in the case of principal and surety.]

Co-promisees

367. When two or more persons contract as promisees in respect of the same performance they may contract as:—

(a) joint; or

(b) several,

promisees. They cannot contract as joint and several promisees.

Slingsby's Case (1588) 5 Rep. 18 b.

Eccleston v. Clipsbam (1668) 1 Wms. Saund. 153.

Bradburne v. Botfield (1845) 14 M. & W. 573.

Whether they contract as joint promisees or as several promisees, is a question of construction for the Court in each case.

Keightley v. Watson (1849) 3 Ex., at p. 721.

White v. Tyndall (1888) L. R. 13 App. Ca. 263.

368. When several parties are joint promisees in respect of the same promise, they can only claim performance collectively from the promisor, and must all be parties to an action upon the promise. *Enforcement by joint promisees*

Cabell v. Vaughan (1669) 1 Wms. Saund. 461 n. (1).

Jell v. Douglas (1821) 4 B. & Ald. 374.

[They need not all be joined as parties plaintiff. (*Luke v. South Kensington Hotel Co.* (1879) 11 Ch. D. 121; *Cullen v. Knowles* [1898] 2 Q. B. 380.)]

369. If one joint promisee dies, his rights survive to the other or others, and, ultimately, to the representatives of the last survivor; but, in the case of joint loans, the survivor or survivors and the representatives of the last survivor are presumptively accountable to the representatives of a deceased joint promisee, in respect of his share. *Survival of rights of joint promisee*

Anderson v. Martindale (1801) 1 East, 497.

Re Jackson (1887) 34 Ch. D. 732.

Steeds v. Steeds (1889) 22 Q. B. D. 537.

370. Payment to one joint promisee discharges the promisor's liability to the other or others. *Payment to one joint promisee*

Wallace v. Kelsall (1840) 7 M. & W. 264.

Powell v. Brodburst [1901] 2 Ch., at p. 164.

[This is the Common Law rule; and there is nothing inconsistent with it in *Steeds v. Steeds* (22 Q.B.D. 537), which merely recognises the rule that, in case of doubt, equity presumes against a joint loan. If upon the true construction of the contract the creditors are found to be jointly interested, the Common Law rule still applies (per Farwell J., in *Powell v. Brodhurst* [1901] 2 Ch., at p. 164) unless (perhaps) the person to whom the money is paid is known by the debtor to be one of co-trustees.]

*Release by
one joint
promisee*

371. A release by one joint promisee discharges the promisor from his liability to the other or others, unless it was given in collusion with the debtor, and in fraud of the other promisees.

Wilkinson v. Lindo (1840) 7 M. & W. 81.

Bain v. Cooper (1842) 9 M. & W. 701.

Piercy v. Fynney (1871) L. R. 12 Eq. 69.

[Or, perhaps, unless the promisees are known to the debtor to be co-trustees.]

INDEX TO BOOK II, PART I

- Abandonment of right or claim as consideration 94
- Acceptance (*and see* Offer and Acceptance)
 - of goods 99, 100
- Accord and Satisfaction 150, 151
- Account
 - current, payment to 114
 - stated, interest on 118
- Action
 - on contract 86
 - “ “ when none 97, 98, 99
 - for debt, plea of tender in 107
 - “ breach of contract 120, maintainable immediately performance due 115
 - for breach of contract brought before performance due 121
 - “ “ “ “ to deliver specific goods 125
 - “ interest 116
 - interest allowed in 117
 - right of, transfer of for unliquidated damages 141
 - “ “ discharge of 150, 151, 152
 - “ “ against bankrupt 149
- Addition, acceptance of offer subject to 90
- Administrator, accepting personal liability 98
- Agent
 - memorandum of contract signed by 98, 99
 - performance “ “ by 110
- Agreement (*and see* Contract)
 - discharge of contract by 144, 145
 - “ “ “ when one party has performed 145
 - “ “ right of action by 150
 - building, specific performance of 127
- Allocation of payment to particular debt 113, 114
- Alteration
 - acceptance of offer subject to 90
 - of law rendering performance impossible 130
 - “ written instrument, discharge of contract by 149

INDEX TO BOOK II, PART I

- Alternative
 - performances 110, 131
 - “ “ where one impossible 131
- Apportionment
 - of interest between persons successively entitled to fund 116
 - “ payment made generally on account 114
- Assessment of damages, loss subsequent to 123
 - “ “ earnest taken into account on 136, 137
- Assignee
 - entitled according to priority of notice to debtor 142
 - defences of debtor against claim of 142, 143
- Assignment
 - of contract 141
 - “ right to sue for unliquidated damages, 141
 - “ duty arising out of contract 143
 - “ negotiable instrument 143
 - notice of 142
 - “ “ priority of 142
- Attestation of specialty contract 96
- Bailee, breach of contract by 122
- Bank note
 - tender of 107
 - legal tender 108
- Bankrupt, discharge of 149
- Bankruptcy
 - discharge of contract by 148
 - of debtor, creditor's rights in 149
- Bill of exchange
 - interest on 118
 - “ Bill ” includes “ Note ” 118
- Blood relationship as a consideration 93
- Bond
 - interest on penal 118
 - “ “ single 118
 - condition of, impossible of performance 133, 140
 - construed as contract 140
- Breach of contract 120
 - damages for 120, 121, 122, 123, 147
 - “ “ measure of 121
 - “ “ subsequent loss 123
- Bronze coin, legal tender of 108

INDEX TO BOOK II, PART I

Building agreement, specific performance of 127

Business usage — *see* Usage

Change, demand of on tender 108

Cheque, tender of 108

Children

may enforce covenant for their benefit in marriage settlement 104

of widow by former marriage 104

“ widower “ “ 104

Coin

tender of current 107

foreign 108, 109

legal tender of gold 108

“ “ “ silver 108

“ “ “ bronze 108

Communication

of offer 88

“ acceptance 90

“ “ dispensed with 91

Compensation for non-performance after waiver of breach of condition 135

Compound interest 115

Concealment of facts, ground for refusing specific performance 126

Conclusion of contract 87, 90

Concurrence

essential to performance of contract by other party 106

of third person, performance conditional on 107

Condition

acceptance of offer subject to 90

suspensive, delivery of instrument subject to 96

precedent to performance 115, 146

“ “ “ of reciprocal promises 134, 135, 146

possibility of performance a 129, 130

of bond, impossibility of performance of 133, 140

breach of, waived by acceptance of part performance 135

subsequent, discharge of contract by 145

“ “ “ “ rights acquired prior to 146

Conduct

indicating intention to contract 86

communication of offer by 88

“ “ acceptance by 90

acceptance of offer by 91

“ “ goods by 100

INDEX TO BOOK II, PART I

Conduct — *continued*

- delivery of instrument by 97
- performance necessary determined by 105
- renunciation of contract by 147

Confidence, performance involving personal 110, 111, 141

Consideration

- simple contract requires a 92
 - specialty contract valid without 96
 - “ “ , remedy for breach of, without 96
 - sufficient, what is 93, 94, 95
 - blood or marriage relationship good 93
 - executed 93
 - executory 93
 - act antecedent to promise, no 93
 - “ subsequent “ “ “ 93
 - “ in pursuance of request, a 94
 - “ compelled by law, no 95
 - “ contrary to morality, no 95
 - promise of thing contrary to course of nature, no 95, 140
 - “ “ “ impossible in law, no 95, 140
 - abandonment of right or claim, a 94
 - value of, need not equal value of promise 94
 - memorandum of contract must show 101
 - “ “ “ “ “ , except guarantee 101
 - “ “ “ “ “ , but oral evidence admissible to ascertain 101
 - illegal 139
 - absence of, for assignment, debtor cannot rely on 142
 - discharge from contract by party who has performed requires 145
- ### Construction of contract 137, 148
- “ “ as to character of co-promisees 157, 158

Contract

- formation of 85
- definition of 85
- void 85, 129
- voidable 85
- unenforceable 86, 97, 98, 99
 - “ by lapse of time 86
 - “ unless in writing 97, 98, 99
 - “ “ “ “ yet valid 100
 - “ rendered enforceable *ex post facto* 86, 98
 - “ by known impossibility of performance 129

INDEX TO BOOK II, PART I

Contract — *continued*

obligation, intention to create legal necessary 86

“ must be ascertainable 87

“ how to be ascertained 87

when concluded 87, 90

not to revoke offer 89

formal, agreement subject to 91

specialty 92

“ without consideration, valid 96

“ “ “ remedy for breach of 96, 127

“ requisites of 96

“ execution in duplicate 97

“ unilateral 97

“ “ execution by promisee of, unnecessary 97

simple 92

“ requires a consideration 92

parol 92

form of 92, 128

must contain promise 92

executed 93

executory 93

not to be performed within a year 98

for sale of goods of value of £10 99

“ “ “ land 98

“ “ “ “ , interest on purchase-money under 119

“ “ “ “ , “ “ lien for return of deposit under 119

“ “ “ “ , failure of vendor to show good title under 121

“ “ “ “ specific performance of 125

goods of value of £10, sale of 99

“ , recognition by acceptance of 100

“ , for delivery of 112

of marine insurance 100

gathered from several documents 101

parties to 103, 104

assignment of 103, 141

acquirement of rights under 103

incurring liability under 103

right of action on 104

performance of 105, 106

“ “ impossibility of 95, 129

to pay interest on debt 115

“ “ by bill, interest on 118

INDEX TO BOOK II, PART. I

Contract — *continued*

option of promisee to regard as broken 120

breach of 120

“ “ by non-performance 120

“ “ action for 120

“ “ “ “ prospective damages in 123

“ “ “ “ before performance due 121

“ “ loss following, when recoverable 122

“ “ by bailee 122

“ “ to marry 122

“ “ injured party may make good 123

“ “ damages for, mitigation of 121, 124

specific performance of, relating to land 125

“ “ “ “ “ marriage articles 125

“ “ “ “ “ movables, not decreed 125

“ “ “ “ for personal service “ “ 127

“ “ “ “ determinable at will of either party not

decreed 127

specific performance to build 127

injunction to restrain breach of negative 128

“ “ “ “ “ though positive in form 128

conditional on possibility of performance 130

rights under, acquired prior to impossibility of performance 132

bond construed as 140

discharge of — *see* Discharge of Contract

Contribution

among co-promisors 156

“ “ when one insolvent 156

presumption of equal, rebuttal of 156

Co-promisees 156, 157, 158

Co-promisors 153, 154

performance by one of 154

judgment against “ “ 154

release of “ “ 155

execution on judgment against 155

contribution among 156

“ “ when one insolvent 156

Counter-claim 109

Counter-offer, lapse of offer on 88

Counter-part 97

Country bank notes, tender of 108

Court, payment into with plea of tender 107

INDEX TO BOOK II, PART I

Covenant 92

in marriage settlement, enforcement of, by children 104

Covenantee 92

Covenantor 92

Credit, mutual 143

Creditor

tender, dispensing with production of money on 107

“ , objecting to 108

“ , refusing on specified ground 109

change, not bound to give 108

receipt for £2 or upwards, withholding 109

representatives of, right of, to claim performance 111

without the jurisdiction 111

right of action of, on bankruptcy of debtor 149

Custom

contract to pay interest inferred from 115

trade 115

Damages

for breach of contract 120, 147

“ “ “ “ specialty without consideration 96

“ “ “ “ to pay a fixed sum 120

“ “ “ “ measure of 121

“ “ “ “ “ in action brought before performance

due 121

“ loss following breach of contract as natural consequence 122

“ “ “ “ “ “ contemplated by parties 122

“ injury to feelings 122

“ “ “ “ on breach of contract to marry 122

“ trouble and inconvenience occasioned to plaintiff 123

interest awarded as 117, 118

earnest to be taken into account in assessing 136

liquidated 137, 138, 139

penalty 137, 138, 139, 140

prospective 123

assessment of, loss subsequent to 123

cost of making good the breach may be included in 123

where loss might have been avoided by plaintiff 124

mitigation of 121, 124

nominal 124

“ costs on award of 124

inadequate, specific performance where 125

INDEX TO BOOK II, PART I

- Damages — *continued*
 - unliquidated, assignment of right to sue for 141
- Date
 - payment of debts in order of 114
 - interest allowed from what 117
- Dealing, inference from course of 115
- Death
 - lapse of offer on 88
 - performance rendered impossible by 130
- Debt
 - tender of 107
 - payment into Court of 107
 - “ allocation of, to particular 113
 - “ order of 114
 - interest on 115
 - discharge of liquidated 151
 - “ “ “ *pro tanto* 152
- Debtor
 - cannot demand change 108
 - “ make giving of receipt a condition of payment 109
 - representatives of, when bound to performance of contract 110
 - “ “ defences open to 110
 - notice to, of assignment 142
 - defences of, against assignee 142
 - bankruptcy of 149
- Deed, delivery of 96
- Delay
 - refusal of specific performance on ground of 126
 - in performance of contract 148
- Delivery
 - of instrument 96
 - “ “ subject to suspensive condition 97
 - unilateral specialty contract binding from 97
 - of goods 99, 100, 112, 113
- Demand
 - antecedent to enforcement of performance 115
 - of delivery of goods 113
 - “ payment, interest from 117
- Deposit
 - on sale of land, action for return of 121
 - “ “ “ “ interest on 119, 121
 - “ “ “ “ lien for 119

INDEX TO BOOK II, PART I

Deposit — *continued*

on sale counts as earnest 136

Disability, voluntary, to perform contract 120, 146

Discharge

of contract 144

“ “ by performance 144

“ “ “ agreement 144, 145

“ “ “ “ when one party has performed 145

“ “ “ condition subsequent 145, 146

“ “ “ breach of condition 146

“ “ “ renunciation 147

“ “ “ delay in performance 148

“ “ “ operation of law 148, 149

“ “ election to treat default as, non-exercise of 147

“ bankrupt 149

“ right of action 150

“ “ “ “ by release 150

“ “ “ “ “ “ by one of joint promisees 158

“ “ “ “ “ “ “ “ “ “ unless fraudulent

158

of right of action by accord and satisfaction 150, 151

“ “ “ “ “ payment 151, 152

“ “ “ “ “ “ to one of joint promisees 157, 158

“ “ “ “ “ judgment 152

“ “ “ “ “ lapse of time 152

Disclaimer of benefit of covenant 97

Documents

contract gathered from several 101

connecting, by oral evidence 102

letter and envelope one 102

made before action as evidence of but subsequent to contract 102

“ “ “ “ “ “ “ “ intended to repudiate contract 102

Duplicate, execution of specialty contract in 97

Duty arising out of contract unassignable 143

Earnest

to bind bargain 99, 136

“ “ “ return of 136

“ “ “ forfeiture of 136

deposit on sale is 136

Election

of alternative performances 110

INDEX TO BOOK II, PART I

Election — *continued*

of alternative performances irrevocable 110

“ remedy 139

to treat contract as discharged 146, 147, 148

“ “ “ “ “ non-exercise of 147

Envelope and letter one document 102

Equitable

jurisdiction 98

relief 99

Escrow 97

Essence of contract

time of 113, 148

“ “ extension of 113

Evidence

of matters *dishors* the contract not admitted 87

“ contract, what required in certain cases 97, 98, 99

“ “ absence of requisite 86

“ “ parol, when writing required 99

oral, admissible to identify parties to contract 101

“ “ “ ascertain subject matter of contract 101

“ “ “ “ consideration 101

“ “ “ connect documents 102

documentary 101, 102

earnest is, of conclusion of contract, 136

Executed

consideration 93

contract 93

Execution on judgment against co-promisors 155

Executor promising to answer damages out of his own estate 98

Executory

consideration 93

contract 93

Extension of time 113

Fact

question of, what is reasonable time for forbearance to assert a claim is 95

“ “ “ “ “ “ “ performance of contract is 112

“ “ “ “ “ hour “ delivery of goods is 113

impossibility of 129, 130

Failure to perform contract 120, 146, 148

Feelings, no damages for injury to 122

“ “ “ “ “ except breach of contract to marry 122

INDEX TO BOOK II, PART I

Forbearance, as consideration 94, 95

Foreign

 coin 108

 currency, debt payable in, 109

 judgment 110

Forfeiture of earnest 136

Form of contract 92

 “ “ agreement subject to particular 91

 “ “ specialty 96

Formation of contract 85

Fraud, specific performance refused on ground of 126

Gold coin, legal tender of 108

Good consideration 93

Goods

 contract for sale of, of value of £10 99

 “ “ “ “ “ “ “ “ when unascertained or incom-
 pleted 100

 contract for sale of, of value of £10 for future delivery 100

 specific, property in, under unenforceable contract 86

 acceptance of 99, 100

 delivery of 100, 112, 113

Guarantee

 contract of, must be in writing 98

 consideration for, need not appear, 101

Hereditaments, contract relating to 98

Illegality, penalty inducing 139

Illness rendering performance impossible 130

 “ “ “ “ notice of 131

Immoral act, no consideration 95

Impossibility of performance 95, 129, 130

 knowledge of 89, 129, 140

 supervening 130, 132

 notice of 131

 of one alternative 131

 partial 132

 inability not 132

Inability to perform contract, not impossibility 132

Indemnity, contract of, need not be in writing 98

Infant, specific performance of contract not decreed for 128

INDEX TO BOOK II, PART I

Injunction

specialty contract without consideration, not granted on breach of 96

negative “ , to restrain breach of 128

“ “ “ “ “ “ though positive in form 128

though penalty or liquidated damages provided for 139

Insolvency of co-promisor 156

Instrument — *see* Negotiable Instrument

Insurance, contract of marine 100

Intention

to create legal obligation, necessary to contract 86

ascertainment of 86

concurrent expression of, completion of contract by 87

of offeror to be bound without previous communication of acceptance 91

where agreement subject to formal contract 91

expression of not to perform contract 120, 146

in delivery of instruments 97

to repudiate contract, document made with 102

“ exclude performance by agent 110

“ “ “ “ “ presumption of 110

“ “ claim by representatives of creditor to enforce contract I I I

“ “ “ “ “ “ “ “ “ pre-
sumption of III

that contract conditional on possibility of performance 130

“ “ “ “ “ “ presumption of
130

presumption of 110, 111, 130

where partial impossibility of performance 132

liquidated damages or penalty 137

to prevent assignment of contract 141

“ accept new promise in satisfaction 151

alteration of written instrument with 149

Interest

tender must include 108

“ stops accrual of 108

in land, contract relating to 98

on debt 115

simple 115

compound 115

accrual of, 116

apportionment of 116

action for 116

INDEX TO BOOK II, PART I

Interest — *continued*

- separable from principal 116
- statute barred 116
- rate of 116, 117, 118, 119
 - “ “ money lenders’ 116
 - “ “ on judgment 117
 - “ “ mercantile 119
 - “ “ equitable 119
- on judgment of High Court 117
 - “ “ “ County Court 117
- “ bill of exchange 118
- “ promissory note 118
- “ contract to pay by bill 118
- “ account stated 118
- “ money paid by surety 118
- “ bond penal 118
 - “ single 118
- as damages 117, 118
- under contract of sale of land 119
 - “ “ “ “ “ “ on purchase money 119
 - “ “ “ “ “ “ “ lien for return of deposit 119
- in action for breach of contract 121

Joint

- promisors 153 — *and see* Co-promisors
 - “ liability on death of one of 155
 - “ “ “ “ “ last surviving of 155
- and several promisors — *see* Co-promisors
- promisees 156
 - “ enforce performance collectively 157
 - “ rights of, on death pass to survivors 157
 - “ “ “ “ “ “ “ except in case of joint
- loan 157
 - “ payment to one of 157
 - “ release by “ “ 158
 - “ “ “ “ “ “ “ fraudulent 158
- loan, presumption in case of 157, 158

Judge directs jury on law 124

Judgment

- interest on, High Court 117
 - “ County Court 117
- discharge of right of action by 152

INDEX TO BOOK II, PART I

Judgment — *continued*

- against one of co-promisors 154
- “ co-promisors, execution on 155

Jurisdiction, creditor without the 111

Jury

- assess damages 124
- directed by judge on law 124

Knowledge

- of party that performance impossible 89, 129, 140
- “ offer 91
- “ promisee by specialty of contract unnecessary 97
- “ promisor of identity of promisee “ 103
- “ creditor of fulfilment of condition precedent, notice of 115
- “ debtor that joint-promisees are trustees 158

Land

- contract relating to 98
- “ “ “ specifically enforceable 125
- “ for sale of, interest under 119
- “ “ “ “ “ on purchase-money 119
- “ “ “ “ “ “ lien for return of deposit 119

Lapse

- of offer 88
- “ “ acceptance after 90
- “ time, right of action barred by 152

Law

- act compelled by, no consideration 95
- performance impossible in 95, 129, 140
- “ “ owing to alteration of 130
- “ required by contract determined by 105
- assignment of contract by operation of 103
- discharge “ “ “ “ “ 148
- Merchant 118
- question of, whether less probable consequence of breach of contract
122
- judge directs jury on 124
- alteration of, rendering performance impossible 130
- operation of, assignment of contract by 103
- “ “ “ “ right of action by 141
- “ “ discharge “ “ “ “ “ 148
- “ “ “ “ “ “ “ merger 148

INDEX TO BOOK II, PART I

Law — *continued*

operation of, discharge of right of action by bankruptcy 149
“ “ “ “ “ “ “ “ alteration of written instrument 149

Lease, at once conveyance and contract 87

Letter and envelope one document 102

Liability under contract 103

“ “ of joint promisors on death of one 155
“ “ “ “ “ “ “ “ survivor 155

Limitation, Statutes of

right of action barred by 150
contract rendered unenforceable by 86
revival of claim barred by 86
allocation of payment to debt barred by 114
interest barred with principal 116

Liquidated

damages 137, 138, 139
“ or penalty 137, 138
“ injunction notwithstanding provision for 139
“ specific performance notwithstanding provision for 139
debt, discharge of 151
“ “ “ *pro tanto* 152

Loan, joint 157, 158

Loss probable consequence of breach of contract 122

subsequent to assessment of damages 123

Marine insurance 100

Marriage

relationship as a consideration 93
promise in consideration of 98
“ of, breach of 122
mutual promises of 98
settlement, children enforcing covenant for their benefit in 104
articles, contract relating to specifically enforceable 125

Maturity of bill, interest after 118

“ “ until 118

Measure of damages 121

Memorandum in writing of contract, when required 98, 99

“ “ “ what is sufficient 100, 101

Merchant, law 118

Merger, discharge of contract by 148

Mint, establishment of, in British possessions 108

INDEX TO BOOK II, PART I

Misrepresentation, refusal of specific performance on ground of 126

Mistake

refusal of specific performance on ground of 126

alteration of written instrument by 149

Mitigation

of consequences of breach of contract 124

“ damages 121, 124

Money

tender of 107

“ accompanied by production of 107

lenders 116

Morality, act contrary to, no consideration 95

Moveables, contracts relating to seldom specifically enforced 125

Mutual credit 143

Nature, performance contrary to course of 95, 129, 140

Negative contract

injunction to restrain breach of 128

“ “ “ “ “ though positive in form 128

Negotiable instrument

assignment of 143

discharge “ 145

alteration “ 149

accord and satisfaction by 151

Non-acceptance, lapse of offer by 88

Note

in writing of contract, when required 98, 99

“ “ “ “ what is sufficient 100, 101

promissory — *see* Promissory Note

Notice

of fulfilment of condition precedent 115

“ intention to claim interest 117

“ assignment 142

priority of 142

limiting time for performance 148

Obligee 92

Obligor 92

Offer and acceptance 85, 87

communication of offer 88

“ “ acceptance 89, 90, 91

revocation of offer 88, 89

INDEX TO BOOK II, PART I

Offer and acceptance — *continued*

offer when binding 88

“ lapse of 88

“ “ “ acceptance after 90

“ contract not to revoke 89

“ request amounting to 94

“ acceptance not in terms of 90

acceptance, time and manner of 88, 89, 90

“ qualified 90

“ after lapse or revocation of offer 90

“ not in terms of offer 90

“ by post 90

“ “ conduct 91

Operation of law

discharge of contract by 148

“ “ “ “ merger 148

“ “ “ “ bankruptcy 149

“ “ “ “ alteration of written instrument 149

Option

of promisor as to alternative performances 131

“ promisee “ “ “ “ 131

to treat contract as discharged 146, 147

“ “ “ “ “ not exercised 147

Oral evidence — *see* Evidence

Order

of payment of debts 113

“ performance of reciprocal promises 134

Parol

contract 92

evidence of contract required to be in writing 99

Parties to contract 103

“ “ must be ascertained 101, 103

“ “ obligation of, to perform 105

“ “ identification of, by oral evidence 101

“ “ action by or against persons not 103

Partner, death of, liability for partnership debts on 155

Payment

part, where contract unenforceable 99

“ earnest treated as 136

promise of, no accord and satisfaction by 151

tender of 106, 107, 108, 109

INDEX TO BOOK II, PART I

Payment — *continued*

- tender of production of money on 107
- into court 107
- allocation of, to particular debt 113, 114
- presentment of bill for, interest after 118
- in satisfaction 151
- to one of joint promisees 157
- “ “ “ trustees 158

Penalty

- or liquidated damages 137, 138, 139
- injunction notwithstanding provision for 139
- specific performance notwithstanding provision for 139

Performance

- executory consideration becomes executed on 93
- required by contract, must be determined 87
 - “ “ “ how determined 105
- of terms of offer without previous acceptance 91
- part 98, 135
 - “ of reciprocal promises 135
- specific — *see* Specific Performance
- of duties under contract 105
- must be complete and according to terms of contract 105
- tender of 106
- alternative modes of 110, 131
- conditional on concurrence of third person 107
 - “ “ antecedent demand 115
 - “ “ happening of event 115
 - “ “ possibility 129, 130
- by agent or servant 110
- “ personal representatives 110
- place of 111
 - “ “ not fixed 111
 - “ “ “ “ when creditor without the jurisdiction 111
- time of 112
 - “ “ not fixed 112
 - “ “ limiting 148
- failure of 120, 146
 - “ “ within time limited 148
- expression of intention to withhold 120, 146
- action brought before due 121
- impossibility of 129, 130, 131, 132
 - “ “ produced by promisor 120, 146

INDEX TO BOOK II, PART I

Performance — *continued*

impossibility of known to party contracting 129, 130

“ “ eventual 130, 131, 132

“ “ “ notice of 131

“ “ partial 132

“ “ one alternative 131

“ “ inability to perform is not 132

of independent reciprocal promises 134

“ interdependent “ “ 134

security for, earnest as 136

discharge of contract by 144

tender equivalent to 144

liability for, of co-promisors 154

by one of co-promisors 154

enforcement of, by joint promisees 157

Personal

confidence 110, 111, 141

representatives — *see* Representatives

service, contract of, specific performance of, not decreed 127, 128

“ “ “ conditional on possibility of performance 130

Place

of performance 111

“ “ not fixed 111

“ delivery of goods 112

Pleading

matters rendering contract unenforceable 86

set-off 109

Policy (*and see* Public Policy)

contract of marine insurance must be in form of a 100

Possession before completion of purchase of land, interest payable from 119

Post, acceptance of offer by 90

“ “ “ “ letter delayed or lost 91

Precedent, condition, to performance 115

“ “ “ of reciprocal promises 134, 135, 146,

147

Presentment of bill, interest after 118

Presumption

of intention 110, 111

on payment to account current 114

as to contribution among co-promisors 156

“ “ “ “ rebuttal of 156

“ “ joint loan on death of co-promisee 157

INDEX TO BOOK II, PART I

Principal and surety 156

Promise

every contract contains 92

reciprocal 92, 134, 135, 146, 147

consideration for, necessary in simple contract 92

act antecedent to 93, 94

“ subsequent “ 93

and consideration need not be of equal value 94

of act contrary to law, morality or public policy 95

“ “ compelled by law 95

“ thing impossible in “ 95

“ “ contrary to course of nature 95

by executor or administrator to answer damages 98

to answer for debt or default of another 98

in consideration of marriage 98

gratuitous, not specifically enforced 127

breach of, entitling to damages 120, 121, 122, 123, 147

“ “ giving option to treat contract as discharged 147

new, acceptance of, in satisfaction 151

of payment, no accord and satisfaction 151

Promisee 92

need not be known to promisor 103

option of as to alternative performances 131

alteration of written instrument by 149

joint 156, 157, 158

several 156

Promisor 92

option of as to alternative performances 131

intention of, not to perform contract 120

disabling himself from performing contract 120

“ “ “ “ “ temporarily 120

consent of, to alteration of written contract 149

joint 153, 154, 155, 156

several 153, 154, 155

joint and several 153, 154, 155, 156

Promissory note

interest on 118

“ Bill ” includes 118

Prospective damages 123

Public policy, act contrary to, no consideration 95

Purchaser of land, action by, on failure of vendor to make a title 121

INDEX TO BOOK II, PART I

- Rate of interest 116, 117, 118, 119
 “ “ on judgment 117
- Reasonable
 time for forbearance to assert a claim 95
 “ “ performance of contract 112, 148
 hour for delivery of goods 113
- Receipt
 of goods under unenforceable contract 99
 tender cannot be conditional on giving of 109
 request for 109
 refusal of for £2 or upwards 109
- Receiving order, effect of on contractual rights 149
- Reciprocal promises 92, 134, 135, 146, 147
- Refusal
 lapse of offer on 88
 of offer by qualified acceptance 90
 “ tender on specified ground 109
- Relationship, blood or marriage as a consideration 93
- Release
 of right of action 150
 “ one of co-promisors 155
 by one of joint promisees 158
 “ “ “ “ “ fraudulent 158
 “ “ “ trustees 158
- Remedy, election of 139
- Renunciation of contract 147
- Representative, personal
 of debtor, performance of contract by 110
 “ “ defences open to 110
 “ creditor enforcing performance 111
 “ partner liable for partnership debts 155
 “ last surviving joint promisor 155
 “ “ “ “ promisee 157
 “ co-promisor, contribution by 156
 “ co-promisee, as to share of joint loan 157
- Request
 act done in pursuance of 94
 made condition precedent to enforcement of performance 115
- Restriction, acceptance of offer subject to 90
- Return of thing given in earnest 136
- Revocation of offer 88, 89
 “ “ implied 89

INDEX TO BOOK II, PART I

Revocation of offer — *continued*

“ “ in breach of contract 89

“ “ acceptance after 90

Rights under contract 103, 104

“ “ effect of receiving order on 149

Sale, contract for, of land 98

“ “ “ “ interest under 119

“ “ “ goods of value of £10 99

“ “ “ “ delivery under 112

“ “ deposit on 99, 121, 136

Satisfaction (*and see* Accord and Satisfaction)

payment in 151

Seal

want of, effect of, when requisite 96

specialty contract requires 96

delivery of instrument under 96, 97

discharge of contract requiring 145

“ “ right of action by release under 150

Security for performance of contract, earnest is 136

Servant, performance by 110

Service, personal, contract for, specific performance of, not decreed 127, 128

“ “ “ conditional on possibility of performance 130

Set-off not to be deducted from debt on tender 109

pleading 109

Settlement, marriage, enforcement by children of covenant for their benefit

in 104

Several

promisors 153, 154, 155 (*and see* Co-promisors)

“ judgment against one of 155

“ joint and — *see* Joint and several promisors

promisees 156

Signature

of specialty contract 96

“ memorandum in writing of certain contracts 98, 99

“ “ “ “ “ “ “ by agent 98, 99

“ contract gathered from several documents 101

position of 101

printed name may be sufficient 101

Silver coin, legal tender of 108

Simple contract 92

requires a consideration 92

INDEX TO BOOK II, PART I

- Simple contract — *continued*
 - merger of in specialty contract 148
- Skill, performance requiring 110
- Social engagement not a contract 86
- Specialty contract 92
 - without consideration, valid 96
 - “ “ remedy for breach of 96, 127
 - requisites of 96
 - delivery of 96
 - “ “ as an escrow 97
 - execution of, in duplicate 97
 - unilateral 97
 - discharge of by performance of substituted simple contract 145
 - merger in, of simple contract 148
- Specific performance 96, 98, 125, 126, 127, 128
 - in discretion of Court 126
 - grounds of refusal of 126
 - not decreed in favor of infant 128
 - decreed though penalty or liquidated damages provided for 139
- Stamped receipt, refusal to give 109
- Statute of Limitation — *see* Limitation
- Subject-matter of contract 101
 - “ “ oral evidence admissible to ascertain 101
- Subsequent
 - loss, to assessment of damages 123
 - condition, discharge of contract by 145, 146
 - “ “ “ “ right acquired prior to happening 146
- Substitution, discharge of contract by 146
 - “ “ “ of unenforceable agreement 146
- Surety
 - interest on money paid by 118
 - principal and 156
- Survivor
 - of joint promisors, liability of representative of last 155
 - “ “ promisees 157
- Suspensive condition, delivery of instrument subject to 97
- Tender
 - of performance 106
 - “ “ must be unconditional and complete 106
 - “ “ where reciprocal promises 134

INDEX TO BOOK II, PART I

Tender — *continued*

- of payment 106, 107, 108, 109
- time and manner of 106, 107, 113
- without payment no discharge 107
- plea of 107
- production of money on 107
 - “ “ “ “ dispensed with 107
- of Bank notes 107, 108
 - “ “ “ country 108
- legal 108
- of coin of United Kingdom 107
 - “ “ “ foreign 108
 - “ cheque 108
 - “ more than is due 108
- interest must be included in 108
 - “ does not accrue after 108
- refusal of on specified ground 109
- conditional on giving of receipt 109
- less amount of set-off 109
- of delivery of goods 113
- equivalent to performance 144

Tenement, contract relating to 98

Time

- for performance of contract 112
 - “ “ “ “ not fixed 112
 - “ “ “ “ notice limiting 148
- essence of contract 113, 148
 - “ “ “ effect of extension when 113
- lapse of, right of action barred by 152

Trade custom — *see* Custom

Trustees

- one of, payment to 158
- “ “ release by 158

Trusts, creation of 103

Unilateral

- specialty contract 97
- contract need not be executed by promisee 97

Usage

- performance required by contract determined by 105
 - “ “ “ “ “ “ where partially impos-
sible 132

INDEX TO BOOK II, PART I

Usage — *continued*

inference from, of contract to pay interest 115
business 115

Vendor of land failing to make a title 121

Waiver of breach of condition by acceptance of part performance 135

Warranty 147

Writing

under seal, effect of want of, when requisite 97

specialty contract requires 96

contract unenforceable without 86, 98, 99

“ “ “ executor or administrator promising to
answer damages 98

contract unenforceable without guarantee 98

“ “ “ promise in consideration of marriage 98

“ “ “ relating to land 98

“ “ “ not to be performed within a year 98

“ “ “ for sale of goods of value of £10 99

part performance where no, effect of 98

demand of payment in 117

contract requiring, discharge of by parol 145

Year, contract not to be performed within a 98